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Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1994

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors,

Petitioners,

vs.

Seattle-First National Bank and SeaFirst America Corporation,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Appendix to
Petition for Writ of Certiorari

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TABLE OF CONTENTS

In re Manges (Manges v. Seattle-First Nat'l Bank, 29 F.3d 1034 (5th Cir. August 29, 1994) 1

Manges v. Seattle-First Nat'l Bank, No. C-91-208 (S.D. Tex. May 4, 1993) 23

In re Duval County Ranch Co., No. 89-01286-C-11; No. 89-01532-C-11; No. 89-01531-C-11 (Bankr. S.D. Tex. June 10, 1991) (order confirming plan) 33

In re Duval County Ranch Co., No. 89-01286-C-11; No. 89-01532-C-11; No. 89-01531-C-11 (Bankr. S.D. Tex. June 10, 1991) (findings of fact) 49

In re Manges (Manges v. Seattle-First Nat'l Bank, No. 93-7328 (5th Cir. Sept. 29, 1994) (on petition for rehearing) 107

No. 93-7328.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

In the Matter of Clinton MANGES, Debtor. Clinton MANGES, Duval County Ranch C and Man-Gas Transmission,
Appellants-Cross Appellees,
v.
SEATTLE-FIRST NATIONAL BANK and SeaFirst American Corporation, Appellees-Cross Appellants.

In the Matter of DUVAL COUNTY RANCH C,
Debtor.
Clinton MANGES, Duval County Ranch C and Man-Gas Transmission, Appellants-Cross Appellees,
v.
SEATTLE-FIRST NATIONAL BANK and SeaFirst American Corporation,
Appellees-Cross Appellants (Two Cases).

In the Matter of MAN-GAS TRANSMISSION,
Debtor.

Aug. 29, 1994.

Before KING and SMITH, Circuit Judges, and KENT* District Judge:

*District Judge of the Southern District of Texas, sitting by designation.

*KING, Circuit Judge:

Appellants, the debtors in a consolidated bankruptcy proceeding, appeal from he district court's order affirming the bankruptcy court's confirmation of the principal creditor's proposed plan of reorganization. By way of cross-appeal, the creditors request that we dismiss the appeal as moot. On the basis of the facts before us, we agree with the creditors and, upon finding the issues presented to be moot, dismiss the appeal.

I. Background

Appellant Duval County Ranch Company (the "Ranch Company") owned the surface estate of a 99,000-acre ranch in Duval County, Texas. Appellant Man-Gas Transmission Company ("Man-Gas") owned the mineral rights under the ranch property. Both of these companies were wholly owned by the individual debtor and appellant, Clinton Manges ("Manges").[1] The ranch was undisputedly and by far the largest asset of the Manges debtors. Seattle First National Bank ("Seattle") made a loan to the Ranch Company in 1980, which was secured by a mortgage on the ranch surface estate and personally guaranteed by Manges.

A. The Agreed Judgement and Foreclosure

The loan went into default, and Seattle filed suit against the Ranch Company and Manges in the United States District Court for the Western District of Texas, San Antonio Division, to recover the sums owned. Eventually,

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[1]Collectively, we refer to these appellants as the "Manges debtors."

in August of 1988, the parties entered into an agreed judgment pursuant to which the Ranch Company and Manges would make periodic payments on the loan.

After the Ranch Company and Manges subsequently failed to make one of the scheduled payments under the agreed judgment, the Ranch Company filed a voluntary Chapter 11 bankruptcy petition to prevent foreclosure under the agreed judgment. Soon after, Manges and Man-Gas also entered Chapter 11 proceedings.

Seattle requested relief from stay, but agreed to abandon that request temporarily if certain conditions were met. The court signed an "Agreed Order On Motion for Relief From Stay" on September 5, 1990. Pursuant to the order, the Manges debtors were to obtain insurance coverage for improvements to the ranch within ten days of the order's entry. When the Ranch Company failed to obtain the requisite binder for coverage within the agreed time-period, Seattle gave notice of default. After the Ranch Company received the notice and failed to cure the default, the automatic stay was lifted, and the San Antonio court entered an order of sale of the ranch property on October 30, 1990. Although this order was stayed temporarily, the ranch was eventually sold at auction by federal marshals on January 16, 1991 (the "January 16 foreclosure"), and was purchased by SeaFirst American Corporation ("SeaFirst"), a wholly-owned subsidiary of Seattle. The San Antonio court confirmed the sale on

January 17, 1991, and the Manges debtors appealed both the order of sale and confirmation of sale to this court.[2]

B. The Plan of Reorganization

The Manges debtors proposed several plans of reorganization, but the bankruptcy court refused to confirm any of the debtors' proposed plans. Instead, by order entered June 10, 1991, the bankruptcy court confirmed the plan proposed by Seattle and SeaFirst (the "Plan") after the balloting and a four-day confirmation hearing. In connection with the confirmation order, the bankruptcy court issued findings of fact and conclusions of law, including the following: (i) that the Plan complied with all requirements of 11 U.S.C. §§ 1123 and 1129, as well as other applicable law; (ii) that the Plan "was proposed in good faith and not by any means forbidden by law"; (iii) that "[t]he principal purpose of the [ ] Plan is not the avoidance of taxes ..."; and (iv) that the debtors had "no equity in any of the property of the estates subject to the liens."[3]

Under the Plan, a liquidation trust would be created to hold legal title to the debtors' assets for sale and distribution of proceeds to the various creditors (the "Trust"). The Plan appointed a vice-president of Seattle to

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[2] We dismissed that appeal as moot after the bankruptcy court confirmed the creditor plan of reorganization as discussed below.

[3] With respect to this finding, the bankruptcy court further decreed that "[t]he value of the secured claims shall be determined by the sales price for the collateral."

serve as liquidating trustee, overseeing the payment of approximately $80 million in creditors' claims with approximately $35 million in trust assets. The Manges debtors were required to execute the trust agreement creating the Trust as well as a "blanket conveyance" transferring all of their assets to the Trust. In the event the Manges debtors failed to do so, third parties were authorized to execute the appropriate documents. The Plan also provided that, upon its confirmation, the January 16 foreclosure would be rescinded and all liens existing prior to the foreclosure would be reinstated. Another important aspect of the Plan was that SeaFirst would create a $1.3 million creditor fund to pay administrative expenses, priority wage claims, and general unsecured claims. Additionally, SeaFirst voluntarily subordinated its estimated $36 million unsecured claim to those of the remaining unsecured creditors, and Seattle and SeaFirst waived their approximately $1.7 million administrative expense claims.

With respect to tax consequences, the Plan specifically provided that the Trust would be a non-taxable grantor trust--i.e., that the Trust would not be liable for any taxes resulting from the sale of property, The Plan included an express provision that the trustee was under no duty to file federal tax returns or to pay income taxes of any kind. Nor was the trustee obligated to make available trust assets or sale proceeds to satisfy the tax claims. The IRS, one of the Manges' creditors, at first lodged objections, but, during the confirmation hearings, withdrew any objections it had to the Plan. Interestingly, the bankruptcy court, in its June 10 findings and conclusions, specifically found that "[t]here should not be any significant postconfirmation income tax liability to Manges due to the availability of tax attributes, the value

of the collateral, the availability of subchapter S termination,[4] and the lack of personal liability to Manges for [the Ranch Company's] taxes."[5]

C. The Appellate Efforts

The Manges debtors took an appeal from the confirmation order to the district court and unsuccessfully applied for a stay of the Plan pending appeal from both the bankruptcy court and the district court. They also sought a writ of mandamus from this court to compel the district court to issue the stay, but that request was similarly denied. Seattle and SeaFirst urged that district court to dismiss the appeal as moot, but the district court refused, concluding that the Plan had not been substantially consummated. Specifically, the court, below found that the most substantial asset of the debtors--the ranch property--had not been sold, though it recognized that a substantial amount of the Trust property had otherwise been alienated. Reaching the merits, the district

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[4] Although Man-Gas was created as a subchapter S corporation, and consequently tax liabilities could be funnelled through to its owner, Manges, the bankruptcy court deferred entry of its written confirmation order so that Manges could convert Man-Gas to a subchapter C corporation, thus immunizing him from personal liability.

[5] The bankruptcy court further observed that "[e]ven in the event that the debtors are faced with post-confirmation tax liability, the [ ] Plan is not unfair or inequitable since the debtors have had the benefit of the prepetition use of money and property without the burden of paying taxes."

court affirmed the confirmation order by order entered May 4, 1993 (the "May 4 order").

The Manges debtors then commenced the instant appeal. Two days after filing their notice of appeal, on May 14, 1993, the Manges debtors sought and were denied an emergency stay from the district court of its May 4 order pending appeal to this court. This court denied a similar motion for stay on May 25, 1993. On September 7, 1993, the Manges debtors filed an amended motion to stay the Plan pending appeal, but that motion was also denied a week later.

D. The Administration of the Trust

As a consequence of the failure to obtain a stay, numerous events have taken place pursuant to the Plan. The Trust has been created, and, soon after the Plan was confirmed, SeaFirst funded the creditor fund, much of which was subsequently disbursed to administrative claimants and priority wage claimants. According to affidavits filed in the district court while the first tier of this appeal was before the court, the Trust paid over $1.5 million in creditors' claims and over $2.5 million in repairs and operating expenses relating to the ranch property. Those affidavits also reflect that the Trust litigated several unsecured claims and was poised to distribute fifty percent of the remaining monies to the allowed, general unsecured creditors by the time of the district court appeal. The Trust additionally sold working interests, executed oil and gas leases, entered into gas purchase contracts, and leased almost all of the surface area of the ranch for grazing and hunting purposes. It began reducing significant ad valorem tax liabilities which had not been paid for years.

Most significant, however, is the fact that the ranch property and all remaining mineral interests have been sold to non-creditor third parties as of December 16, 1993 (the "December 16 sale"), during the pendency of this appeal. Although we are not informed of what additional, administrative measures have been taken during the course of this appeal, we can only presume that the trustees have continued to implement the unstayed Plan.

II. Analysis

The Manges debtors claim that the Plan as confirmed deprives them of their ability to have a "fresh start" because they will be saddled with significant post-confirmation tax liabilities and will have no estate assets with which those liabilities can be satisfied. Seattle and SeaFirst counter that the controversy is moot because the Plan has been so substantially consummated that this court can no longer provide effective relief.

[1][2][3][4][5][6][7] Generally, the mootness inquiry centers upon the concern that only live cases or controversies be decided by our courts. *See Powell v. McCormack*, 395 U.S. 486, 496 n.7, 89 S.Ct. 1944, 1951 n. 7, 23 L.Ed.2d 491 (1969) (recognizing that the Court's inability to consider the merits of a moot case "is a branch of the [U.S. CONST. art. III] constitutional command that the judicial power extends only to cases or controversies") (citing *Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1912, 20 L.Ed.2d 917 (1968)). A controversy becomes moot in the traditional sense when, as a result of intervening circumstances, there are no longer adverse parties with sufficient interests to maintain the litigation. *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993). Many courts, including our own, however, have

employed the concept of "mootness" to address equitable concerns unique to bankruptcy proceedings.[6] In this context, "mootness" is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions. *See In re AOV Indus., Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986) (recognizing that "[e]ven when the moving party is not entitled to dismissal on article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits") (citations omitted). Consequently, a reviewing court may decline to consider the merits of a

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[6] *See, e.g., In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (recognizing the virtually universal principal that "a plan of reorganization, once implemented, should be disturbed only for compelling reasons" and collecting cases); *Rochman v. Northeast Util. Serv. Group (In re Public Serv. Co.)*, 963 F.2d 469, 471-72 (1st Cir.) (noting that the mootness doctrine facilitates the "important public policy favoring orderly reorganizations and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court' ") (quotation omitted), *cert. denied*, --- U.S.---, 113 S.Ct. 304, 121 L.Ed. 2d 226 (1992); *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981) (holding that reversal of the confirmation order "would knock the props out from under the authorization for every transaction that has taken place, [and] would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court").

confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available--even though there may still be a viable dispute between the parties on appeal. *Halliburton Serv. v. Crystal Oil Co. (In re Crystal Oil Co.)*, 854 F.2d 79, 82 (5th Cir. 1988); *Brite v. Sun Country Dev., Inc. (In re Sun Country Dev., Inc.)*, 764 F.2d 406, 406-07 n. 1 (5th Cir. 1985). The Eleventh Circuit cogently described the competing interests which must be considered in this regard:

> The test for mootness reflects a court's concern for striking the proper balance between the equitable considerations of finality and good faith reliance on a judgment and the competing interests that underlie the right of a party to seek review of a bankruptcy order adversely affecting him.

First Union Real Estate Equity and Mort. Inv. v. Club Assoc. (In re Club Assoc.), 956 F.2d 1065, 1069 (11th Cir. 1992) (citation omitted). The concept of "mootness" from a prudential standpoint protects the interests of non-adverse third parties who are not before the reviewing court but who have acted in reliance upon the plan as implemented. As the Seventh Circuit aptly framed the issue, we must determine "whether it is prudent to upset the plan of reorganization at this late date." *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

[8] This court has historically examined three factors in making this assessment--(i) whether a stay has been obtained, (ii) whether the plan has been "substantially consummated," and (iii) whether the relief

requested would affect either the rights of parties not before the court or the success of the plan. *Ronit, Inc. v. Stemson Corp. (In re Block Shim Dev. Co.)*, 939 F.2d 289, 291 (5th Cir. 1991) (citing *Crystal Oil*, 854 F.2d at 81-82); *Cleveland, Barrios, Kingsdorf & Casteix v. Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994).[7] We evaluate each in turn.

A. Halting the Runaway Train: the Motions to Stay

[9][10] As the Manges debtors correctly observe, in many of the cases in which bankruptcy appeals were dismissed as moot, the appellants failed to seek a stay. *E.G., Crystal Oil*, 854 F.2d at 82 (noting the objecting creditor "should have sought a stay so the reviewing court could consider the plan's propriety before implementation led third parties to make commitments in reliance on the plan"); *Cleveland, Barrios*, 166 B.R. at 286-87 (observing that the failure to seek a stay warrants dismissal of appeal on mootness grounds if the lack of stay has permitted a comprehensive change in circumstances or substantial consummation of the plan); *see also Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981) (dismissing an appeal on equitable grounds where appellant never applied to bankruptcy court for stay). By contrast, the Manges debtors argue, they diligently--albeit unsuccessfully--pursued a stay at every

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[7] The Eleventh Circuit, in a recent opinion on the subject, listed an additional inquiry--whether the relief sought would affect the reemergence of the debtor as a revitalized entity. *See First Union Real Estate Equity and Mort. Inv. v. Club Assoc. (In re Club Assoc.)*, 956 F.2d 1065, 1069 n. 11 (11th Cir. 1992).

turn.[8] Thus, they appear to conclude, they have preserved their right to a merits review. However, in rejecting a similar argument, Judge Easterbrook aptly pointed out that the failure to seek a stay is not "a censurable event to be punished by refusal to adjudicate the merits"; rather,

> [t]he significance of an application for a stay lies in the opportunity it affords to hold things *in stasis*, to prevent reliance upon the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing critical transactions, that counsels against attempts to unwind things on appeal. Every incremental risk of revision on appeal puts a cloud over the plan of reorganization and

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[8] The district court denies the debtors' request for a stay because it was not persuaded that the Manges debtors had the requisite likelihood of success on appeal. The bankruptcy court more fully elaborated its grounds for denial of stay, reasoning that, even if execution of the Plan were stayed, overwhelming circumstances would compel it to lift the automatic stay to allow foreclosure upon the estate's assets. Because foreclosure upon the debtors' assets would leave little to be divided among the remaining claimants, the bankruptcy court concluded that the most fair and equitable result was to confirm the Plan and deny the stay.

> derivatively over the assets of the reorganized firm.

In re UNR Industries, 20 F.3d at 769-70; *see also In re AOV Indus., Inc.,* 792 F.2d 1140, 1147 (D.C. Cir. 1986) (recognizing that unsuccessful attempt to obtain stay had same result as failure to seek stay). In short, the failure or inability to obtain a stay pending appeal carries the risk that review might be precluded on mootness grounds.

Although we recognize that, in many situations, the reviewing court's decision whether to grant a stay is essentially dispositive of the case--considering the average length of time for an appeal[9]--we note that several provisions of the Bankruptcy Code preordain such a consequence. *See, e.g.,* 11 U.S.C. § 363(m) (mandating that the reversal of an unstayed order authorizing the sale or lease of estate property "does not affect the validity of the sale or lease under such authorization to an entity that purchased or leased such property in good faith ... unless such authorization and such sale or lease were stayed pending appeal"); 11 U.S.C. § 1127(b) (curtailing significantly bankruptcy court's ability to modify plan of reorganization after its confirmation and "substantial consummation"); *see also* Bankruptcy Rule 805 ("Unless an order approving a sale of property ... is stayed pending appeal, the sale to a good faith purchaser...shall not be affected by the reversal or modification of such order on

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[9] *See In Re UNR Industries*, 20 F.3d at 768 (noting that "[t]he long delay between the bankruptcy court's confirmation of the plan and the district court's disposition of objections to that action laid the foundation for the conclusion that the plan is beyond challenge").

appeal, whether or not the purchaser knows of the pendency of the appeal."). As the Ninth Circuit recognized in *In re Roberts Farms,* "the principle of dismissal of an appeal for lack of equity ... places a heavy burden on aggrieved party-appellants in bankruptcy cases. It is justified to prevent frustration of orderly administration of estates under various provisions of the Bankruptcy Act." 652 F.2d at 798. It is undisputed that the Manges debtors did not obtain a stay, and we must thus examine the transactions which have taken place as a consequence to determine whether the confirmation challenge has become equitably or prudentially moot.

B. Unscrambling the Eggs: Substantial Consummation

"Substantial consummation" is a statutory measure for determining whether a reorganization plan may be amended or modified by the bankruptcy court. 11 U.S.C. § 1127(b).[10] This court, in addressing the mootness issue, has borrowed the "substantial consummation" yardstick because it informs our judgment as to when finality

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[10] The statutory definition of "substantial consummation" is as follows: "[S]ubstantial consummation" means--(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan. 11 U.S.C. § 1101(2). The district court focused only upon subpart (A) of the test in denying the motion to dismiss, and the parties appear to dispute only that requirement.

concerns and the reliance interests of third parties upon the plan as effectuated have become paramount to a resolution of the dispute between the parties on appeal. *E.g., Block Shim*, 939 F.2d at 291; *accord Club Associates*, 956 F.2d at 1069.

The district court concluded that the Plan had not been "substantially consummated," and, as a result, the relief sought was not moot. The principal basis for this conclusion was the fact that the ranch had yet to be sold at the time the district court entered its order. Of course, that event has now occurred, and we must determine as a threshold matter whether we may properly incorporate the December 16 sale into our mootness analysis. If so, we will then evaluate the effect the sale has upon that determination, in addition to the other transactions which are contended to evidence substantial consummation of the Plan.

1. Evidence of the December 16 sale

The Manges debtors have long recognized the significance of this transaction and the consequent effect it would have on the mootness question. In fact, in requesting a stay during the pendency of this appeal, they represented that:

> The trustee is currently involved in negotiations to sell the property, having received written offers to purchase the property. An order preventing such sale is necessary to prevent the sale from rendering moot the appellants' appeal. ***A sale of this property would leave the bankruptcy estate with***

> ***few assets and would render this appeal moot*** (emphasis added).

As noted above, this court denied the stay.

[11] Now that the ranch has been sold and the threat of mootness looms larger, the Manges debtors challenge the December 16 sale--apparently for the first time--on the basis that there is no evidence that the sale was made to a good-faith third-party purchaser, a requirement that they contend has been incorporated into the first prong of the substantial consummation determination. They also speculate that "discovery ***could conceivably reveal*** ... that [the sale] was not a good faith transfer for value, or was conditioned on the outcome of this appeal" (emphasis added). Reasoning from that assumption, the debtors argue that the recent sale ***might be*** subject to rescission in the event their appeal was successful. Therefore, the Manges debtors previously asked that we remand the case to the district court for discovery on the mootness issue; however, this court denied the request. Although we recognize that the "substantial consummation" test is generally fact-driven such that an evidentiary hearing on the issue would be necessary, there is a very important distinction in the case presented. Substantial consummation here is merely a sub-part of the overall mootness balancing test, as discussed above. Mootness is evaluated by the reviewing court, which may take notice of facts not available to the trial court if they go to the heart of the court's ability to review. *See Board of License Comm'rs v. Pastore*, 469 U.S. 238, 240, 105 S.Ct. 685, 686, 83 L.Ed. 2d 618 (1985) ("When a [post-appeal] development ... could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that

development should be called to the attention of the Court ***without delay***."); *Clark v. K-Mart Corp.,* 979 F.2d 965, 967 (3d Cir. 1992) (Unless reviewing court can receive facts relevant to mootness, "there [is] no way to find out if an appeal has become moot."). Thus, this court may review evidence as to subsequent events not before the courts below which bears upon the issue of mootness. *E.g., Crystal Oil,* 854 F.2d at 81; *Roberts Farms,* 652 F.2d at 796.

Problems can arise, however, where the party opposing a motion to dismiss on mootness grounds contests the newly submitted evidence, as do the debtors here.[11] However, we need not concern ourselves with resolving any such evidentiary dispute in the context of our mootness determination--or remanding it to the bankruptcy court for resolution--because there is no real controversy as to the "facts" regarding the sale of the ranch. Seattle and SeaFirst have filed authenticated copies of the deeds of sale and sales agreements respecting the December 16 sale, and the co-trustees have stated under

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[11] One district court, acting in its appellate function, was faced with a potentially viable challenge to certain affidavit evidence submitted in support of a motion to dismiss on the basis of mootness. *See Huddleston v. Nelson Bunker Hunt Trust Estate,* 102 B.R. 71 (N.D. Tex. 1989). The court determined that the affidavit evidence was appropriately submitted and observed that:

> There may be disputes regarding evidence on the mootness question that are inapposite to the court's decision. If these disputes do not stand in the path of the district court's resolution of the mootness issue, the court need not remand the matter to the bankruptcy court.

Id. at 76 n. 9.

oath that these documents constitute the entire agreement between the Trust and the third-party buyers. Conspicuously absent from the papers before us is any affidavit or documentary evidence--other than sheer speculation by the debtors in their motion to remand--that the sale was somehow compromised in order to facilitate a finding of mootness. This silence is even more suspect in light of the fact that the debtors filed motions to stay in this court to suspend the sale at issue, never once having lodged the charges they make today.[12]

Seattle and SeaFirst urge us to take judicial notice of the unimpeached certified copies of the deeds and assignments executed by the Trust to the third-party purchasers contained in Seattle and SeaFirst's Record Excerpts, an invitation we accept. *E.g. Pratt v. Kelly*, 585 F.2d 692, 696 (4th Cir. 1978); *see also* FED.R.EVID. 201; *cf. Landy v. FDIC*, 486 F.2d 139, 151 (3d Cir. 1973) (taking judicial notice of court documents), *cert. denied*, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed. 2d 312 (1974). We also take note of the properly authenticated sales agreements which fail to evidence any contingency upon the outcome of this appeal. From these documents, it appears that the "centerpiece" of this litigation has been irreversibly sold to third parties. Therefore, "it is very doubtful that effective relief could be afforded even if [the Manges debtors] prevailed on the merits." *In re Information Dialogues, Inc.*,

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[12] We cannot more accurately summarize the situation than did SeaFirst:

For two years, the Manges Debtors played Cassandra, prophesying the fall of their kingdom should the ranch be sold; once the sale happened, they became King Lear, refusing to accept the fate they foresaw.

662 F.2d 475, 476 (8th Cir. 1981) (per curiam). This factor alone weighs heavily in favor of a finding of mootness.

2. Other evidence of "substantial consummation"

Even prior to the sale, the Trust spent millions of dollars improving, upgrading, and preparing the property for sale, countless hours in negotiation of the conveyance, and substantial amounts in appraisals, surveys, and other closing costs. The Trust additionally engaged in negotiations to renew gas production on the ranch mineral estate, to lease both the surface estate and mineral rights, and to dispose of litigation involving Trust assets. Significant amounts were paid to state taxing authorities to reduce the outstanding liability for property taxes on the ranch which had not been paid for several years. Millions of dollars in claims have been paid to date from the creditor fund established by Seattle and SeaFirst.

In sum, (i) the Trust "has transferred all or substantially all of the property proposed by the [P]lan to be transferred"; (ii) the liquidating trustees have assumed the business and management of all the property dealt with by the Plan; and (iii) the Trust has "commence[d] distribution under the [P]lan." 11 U.S.C. § 1101(2). Accordingly, the "substantial consummation" factor counsels convincingly against reviewing the merits of the debtors' challenge to the Plan.

C. The Effect upon Parties not before us

[12] As several courts have made clear, "[s]ubstantial consummation of a reorganization plan is a momentous event, but it does not necessarily make it impossible or inequitable for an appellate court to grant

effective relief." *Frito-Lay, Inc. v. LTV Steel Co., Inc.* (*In re Chateaugay Corp.*), 10 F.3d 944, 952 (2d Cir. 1993) (citing *AOV Industries*, 792 F.2d at 1148). Thus, we must also evaluate the other factors relevant to the mootness issue. With respect to the mootness factor relating to third parties, we reiterate that the ranch property and attendant mineral rights--by far the most substantial assets--have been sold to purchasers who are not before this court. Furthermore, as noted above, millions of dollars in administrative and priority claims have been paid to claimants not parties to this appeal. Millions more have been expended in preparing the property for the sale consummated in December of 1993. The Trust has significantly reduced *ad valorem* tax liabilities by entering into settlements with, and making distributions to, the claimant taxing authorities not participating in the appeal.

We must evaluate these transfers, many of which appear irreversible, against the backdrop of the relief sought--nothing less than a wholesale annihilation of the Plan.[13] All of these third-party recipients and many others

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[13] At oral argument, the Manges debtors' counsel argued for the first time that we might simply strike the offensive portion of the Plan without completely unravelling it. *See Bill Roderick Distrib., Inc. v. A.J. Mackay Co.* (*In re A.J. Mackay Co.*), 50 B.R. 756, 759-60 (D. Utah 1985) (holding that a bankruptcy court may modify a Chapter 11 plan after confirmation by deleting provisions that it did not have the jurisdiction to confirm). We disagree. The Bankruptcy Code provides that a plan may not be modified or amended after substantial consummation has taken place. 11 U.S.C. § 1127(b); *cf. Trans World Airlines, Inc. v. Texaco, Inc.* (*In re Texaco,*

have relied upon the Plan, and the irretrievable depletion of estate assets would correspondingly decrease the amounts available to all claimants. In short, we doubt seriously that we could place the estate or the parties back into the *status quo* as it existed before the confirmation order if we were to unravel the Plan at this time. Therefore, we conclude that this factor weighs heavily against our interference at this late date.

D. Other Factors

Other factors particular to this case also counsel against our intervention. *See In re AOV Industries*, 792 F.2d at 1147-48 ("Determinations of mootness ... require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail."). For example, even assuming the sale of the ranch and mineral rights could somehow be set aside, there is no reason to believe that the property would return to the debtors in the event we reversed the bankruptcy court's confirmation order on appeal. Rather, the ranch would return to SeaFirst, which voluntarily surrendered it to the Trust in order to obtain confirmation of the Plan, and the potential tax liability to the debtors occasioned by the sale on foreclosure would be resurrected.

Inc.), 92 B.R. 38, 46 (S.D.N.Y. 1988) (observing that " 'the piecemeal dismantling of [a plan of reorganization] ... ' is, in practical terms, if nothing else, a virtually impossible task") (quoting *AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986)). In light of the facts that the Plan has been substantially consummated and that the tax provision is integral to the Plan as implemented, the requested modification is simply not possible.

Moreover, Seattle and SeaFirst have expended millions of their own funds--both in cash infusions and forbearance of administrative expenses--in reliance upon the Plan, much of which cannot be recovered. *See, e.g.*, *Crystal Oil*, 854 F.2d at 82 (considering important the fact that a creditor which had made significant sacrifices to obtain confirmation would lose benefits obtained in exchange if appellant successfully overturned plan). Further, if we were to reverse the Plan, the unsecured creditors would likely receive nothing for their claims because the portion of the creditor fund which remains will revert to Seattle and SeaFirst. Additionally, we presume that SeaFirst will reurge its $2 million administrative expense claims and rescind its voluntary subordination of its substantial unsecured debt. The extensive dismantling of this successfully executed Plan would be nothing short of a disaster for the bankruptcy court and the parties before it. These circumstances further persuade us that the instant appeal is prudentially moot.

III. Conclusion

To summarize, the Plan has been virtually fully implemented, and, at this point, unravelling it would be virtually impossible. For the foregoing reasons, we hold that "it would be plainly inequitable for this court to consider the merits of [the Manges debtors' appeal]." *Crystal Oil*, 854 F.2d at 82. Accordingly, we dismiss the appeal.

APPEAL DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE:	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY,	§	
CLINTON MANGES,	§	
AND MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	
	§	
	§	
	§	
CLINTON MANAGES,	§	
ET AL.	§	
	§	
V.	§	C.A. NO. C-91-208
	§	
SEATTLE-FIRST	§	
NATIONAL BANK	§	
AND SEAFIRST	§	
AMERICA	§	
CORPORATION	§	

ORDER DENYING MOTION TO DISMISS
BECAUSE OF MOOTNESS
AND AFFIRMING CONFIRMATION ORDER

Debtor Duval County Ranch Company (DCRC) owned the surface estate of a ranch in Duval County, Texas, and Debtor ManGas Transmission Co. owned the mineral rights. Debtor Clinton Manges owned all of the stock in DCRC and Man-Gas. Beginning in November,

1980, Seattle-First (Seafirst) made various loans to the three debtors and to Helen Ruth Manges, Clinton Manges' wife. The lending relationship deteriorated, and Seafirst filed suit in the Western District of Texas. The parties reached an agreed judgment in favor of Seafirst in the amount of $55,361,545.71, which was signed in August, 1988. Debtors were to pay Seafirst $30,000,000.00 on or before August 10, 1989. Debtors were unable to make that payment, and DCRC filed its petition for bankruptcy protection on August 14, 1989. Clinton Manges and Man-Gas were made the subjects of involuntary petitions on October 2, 1989. In addition to the amount owed to Seafirst, the debtors owed approximately $4,701,897.00 in past due ad valorem taxes assessed against the ranch and mineral interests, as well as owing over $6,000,000.00 to unsecured creditors.

In August, 1990, Seafirst sought to foreclose on the surface estate of the ranch property. The bankruptcy court lifted the stay, and Judge Garcia of the Western District of Texas entered an order of seizure and order of sale. At the foreclosure sale, Seafirst purchased the ranch. Debtors appealed the orders of seizure and sale to the Fifth Circuit.

The creditors filed a proposed plan for reorganization under Chapter 11 of the Bankruptcy Code. While the appeal of the seizure and sale orders was pending, the bankruptcy court signed an order confirming the creditors' plan. The plan provided that Seafirst return the foreclosed ranch to the debtor and that debtors convey their assets, including the returned ranch, to a liquidating trust. Secured claimants would receive payments from liquidation of the trust property. Unsecured claimants were to be paid out of a fund donated by Seafirst.

Debtors appeal from the order confirming the creditors' plan.

Seafirst moves to dismiss debtors' appeal of the confirmation order on grounds of mootness. Once substantial consummation of a Chapter 11 plan creates a situation in which the court could no longer provide relief without affecting newly created rights, an appeal of the confirmation of that plan is moot. 11 U.S.C. § 1127(b); Matter of Sun Country Development, Inc., 764 F.2d 406, 406-07 n.1 (5th Cir. 1985); Central States, Inc. v. Central Transport, 841 F.2d 92 (4th Cir. 1988). Substantial consummation means:

> (A) transfer of all or substantially a of the property proposed by the plan to be transferred;
>
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
>
> (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2).

The Court finds there has been no substantial consummation of this plan. Though the ranch and the mineral rights, the main assets, have been transferred to the liquidating trustee, it has not yet been sold. Accordingly, there are no innocent purchasers involved, and the Court could fashion a remedy. Accordingly, the

Court denies the crditors' (sic) motion to dismiss and addresses the merits of debtors' appeal.

Debtors first contend the bankruptcy court had no jurisdiction to void the foreclosure sale, thus allowing for the return of the ranch to the debtor. Debtors argue only the Fifth Circuit has jurisdiction because debtors already filed their notice of appeal, thus divesting the district court of its jurisdiction over the dispute. This Court disagrees. The bankruptcy court merely resolved a dispute between the debtors and their creditors by allowing the creditors to return the property at issue, thus mooting the appeal. A Chapter 11 plan may provide for the settlement or adjustment of any claim belonging to the debtor or to the estate, 11 U.S.C. § 1123(b)(3), and a compromise involving claims of other parties may be effected by a Chapter 11 plan if it is fair and equitable. In re Texaco, Inc., 84 Bankr. 893, 901 (Bankr. S.D.N.Y. 1988). This Court finds the compromise to be fair and equitable.

Debtors next argue the bankruptcy court erred by not valuing the secured portion of Seafirst's claim. Though the bankruptcy court did not attach a specific monetary value to the claim, it did value all secured claims at the sale value of the collateral securing those claims. The court based that valuation on its findings that there was no equity in any of the property subject to liens, and that the creditors were undersecured. The bankruptcy court's use of sale value to value the secured claims is consistent with the reasoning in Dewsnup v. Timm, 112 S. Ct. 773 (1992). Additionally, this Court finds sufficient evidence to support the findings on which the bankruptcy court based its valuation.

Debtors argue it was impermissible for Seafirst to subordinate its unsecured claim and take the ultimate proceeds from the sale of the collateral as payment on its secured claim. Debtors contend this subordination is a de facto election under 11 U.S.C. § 1111(b), which election is not allowed under a liquidating plan. Under 11 U.S.C. § 506(a), an undersecured creditor gets a secured claim in the amount of the value of the collateral securing its claim, and an unsecured claim for the deficiency. An election under § 1111(b) allows an undersecured creditor in a chapter 11 reorganization to elect to have its entire claim treated as fully secured while waiving its unsecured claim for the deficiency.

The Court finds Seafirst has not made a de facto § 1111(b) election. Seafirst's actions are far more consistent with § 506(a) than with § 1111(b). Seafirst has taken a secured claim in the amount of the value of the collateral securing its loan to debtors, and an unsecured claim for the deficiency. Seafirst has not elected to have its full claim treated as secured, and Seafirst's voluntary subordination of its unsecured claim does not constitute a waiver of that claim.

The plan proponents introduced a Chapter 7 liquidation analysis at the confirmation hearing to demonstrate the unsecured creditors would receive more under the proposed plan than under a Chapter 7 liquidation. The proponents relied on evidence introduced at prior bankruptcy proceedings as well as evidence introduced at the confirmation hearing to support their liquidation analysis. Debtors argue the bankruptcy court erred in failing to value anew each asset in each estate at the confirmation hearing for purposes of such a liquidation analysis. The Court disagrees. The bankruptcy court may

consider prior bankruptcy proceedings as well as evidence presented at the confirmation hearing to engage in such a comparison. In re Aceguia, Inc., 787 F.2d 1352, 1359 (9th Cir. 1986).

Debtors argue the bankruptcy court erred in confirming the plan because the plan did not comply with the requirements of 11 U.S.C. § 1129.[1] This Court finds sufficient evidence to support the bankruptcy court's findings as to the satisfaction of § 1129. Accordingly, those findings are not clearly erroneous.

Debtors argue the bankruptcy court erred in not considering the full effects of the plan on income tax liability: giving the liquidating trustee the power to operate the debtors' property could result in the trust being taxed as a corporation; the foreclosure of the ranch was an irreversible taxable event; the creditor trust is not a grantor trust so it will have its own tax liability.

The bankruptcy court did not err as to the foreclosure of the ranch. The IRS, which is the only entity who could impose the contemplated tax liability, was a party to the confirmation hearing. The representative of the IRS specifically stated "the plan as it is currently stated completely satisfies the existing claim of the IRS and, therefore, we did not oppose confirmation." Because the

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[1]Some of the requirements of § 1129 are as follows: the plan was proposed in good faith, the plan provides more to the creditors than they would have received under a chapter 7 liquidation, the plan is feasible, the plan does not discriminate unfairly, and the principal purpose of the plan is not the avoidance of taxes.

foreclosure and the return of the ranch both occurred before confirmation, any tax liability stemming from the transactions would have been part of the IRS's existing claim. The IRS, like any other creditor who participates in the development of a plan, is bound by the resulting plan. Matter of Crabtree, 76 Bankr. 208, 210 (Bankr. M.D. Fla. 1987). Accordingly, the bankruptcy court need not have considered the possibility of the IRS treating the foreclosure as an irreversible tax event.

The other two claims are related. If the bankruptcy court did not err in finding the trust to be a grantor trust, the court should not have had to consider the possibility of the trust being taxed as a corporation. Debtors cite the Supreme Court's opinion in Holywell Corp. v. Smith, 112 S. Ct. 1021 (1992) for the proposition that the trust is liable for taxes on the gains from sale of the trust property. The Court in Holywell, however, distinguished between a trust formed when the property of the bankruptcy estate, by the terms of the plan, is placed directly in the trust and a trust formed when, as in In re Sonner, 53 Bankr. 859 (Bankr. E.D. Va. 1985), the property revests in the debtor before the debtor transfers it into the trust.

In this case, the terms of the plan required the debtor to sign a blanket conveyance, transferring all of his property to the trust. The property was not placed directly in the trust by the terms of the plan, but revested in the debtor before being conveyed.[2] The Court finds this trust

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[2] For example, when Seafirst transferred the ranch property, thus rescinding the foreclosure sale with the consent of the bankruptcy court, the property went back

to be a true grantor trust like that in Sonner. Accordingly, Holywell does not apply to this trust and the debtor/grantor is liable for any taxes, as the bankruptcy court correctly held.

Debtors next argue the bankruptcy court erred in substantively consolidating the debtors' estates. The bankruptcy court considered the correct factors in determining whether the estates should be consolidated. See Eastgroup Properties v. Southern Hotel Assoc., Ltd., 935 F.2d 245, 249 (11th Cir. 1991); In re Mortgage Investment Co., 111 Bankr. 604, 610 (Bankr. W.D. Tex. 1990). This Court finds the record contains sufficient evidence to support the bankruptcy court's findings, and the consolidation was proper.

Debtors argue the bankruptcy court erred in approving the appointment of Gary Williams, an employee of Seafirst, as trustee because of a conflict of interest. There is no requirement in the Bankruptcy Code that the appointed trustee be free from potential conflicts of interest, only that the trustee not have an "interest materially adverse to the interest of the estate." 11 U.S.C. § 101(14)(E). The bankruptcy court found that any potential conflict is outweighed by the benefit of the appointment of a trustee already familiar with the plan and with the estate, who is willing to serve for free. These findings are reviewable only under the clearly erroneous

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to the debtors. The bankruptcy court then ordered the debtors to convey that property, along with the rest of their property, to the liquidating trust within three days after confirmation of the plan.

standard. In re Lee Holding Co., 102 Bankr. 616, 621 (Bankr. S.D. Ohio 1988). This Court finds there is evidence in the record to support the finding, and the finding is not clearly erroneous. Accordingly, the appointment of Williams was proper.

Finally, debtors argue the bankruptcy court erred by affecting Ruth Manges's property rights without actual notice. She was not denied due process if she had actual notice of the plan. In re DCA Development Corporation, 489 F.2d 43, 47 (1st Cir. 1973); In re Compton, 891 F.2d 1180, 1185 (5th Cir. 1990). This Court already found she had actual knowledge of the plan, and she did not object or appear at the plan confirmation hearings. See Memorandum in Support of Order Denying Motion for Stay Pending Appeal, Misc. No. C-91-23, Finding Numbers 20(i) and (j). Additionally, this Court held she had knowledge of the confirmation of the plan, she owns no property interests affected by the plan, and she has made no homestead claim to any estate property. Id., Conclusion Number 3(b). The bankruptcy court made similar findings, and this Court finds they are supported by sufficient evidence. Accordingly, the bankruptcy court did not deny Ruth Manges her right to due process.

Because there is no merit to any of debtors' grounds for appeal, the bankruptcy court's order is affirmed.

ORDERED this 3 day of May, 1993.

/s/ H.W. Head, Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	NO. 89-01286-C-11
DEBTOR	§	

	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

CLINTON MANGES	§	
DEBTOR	§	NO. 89-01531-C-11

CORRECTED ORDER CONFIRMING FIRST AMENDED CREDITORS' PLAN OF REORGANIZATION OF SEATTLE FIRST NATIONAL BANK AND SEAFIRST AMERICA CORPORATION

After proper notice and a hearing, this Court has considered the First Amended Creditors' Plan of Reorganization of Seattle First National Bank and SeaFirst America Corporation under chapter 11 of the Bankruptcy Code filed by Seattle-First National Bank ("SeaFirst") and SeaFirst America Corporation ("SFA") (collectively "the Proponents") on January 29, 1991 (the "Creditor Plan). The Court, pursuant to its oral findings of fact and

conclusions of law as recited in open court on May 29, 1991, finds:

1. A copy of the Creditor Plan, its approved disclosure statement, the order approving the disclosure statement, and court-approved ballots were transmitted to all persons requiring notice.

2. The solicitation of votes on the Creditor Plan by the Proponents was proper in all respects.

3. The Creditor Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law. Specifically Classes 3, 5, 6, 7, 8, 9, 10, 17, and 18 are impaired and have accepted the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(10).

4. The Creditor Plan complies with the applicable provisions of title 11.

5. The Proponents of the Creditor Plan have complied with the applicable provisions of title 11.

6. The Creditor Plan has been proposed in good faith and not by any means forbidden by law.

7. Each holder of a claim or interest that has not accepted the Creditor Plan will receive or retain under the Creditor Plan property of a value, as of the effective date of the Creditor Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date.

8. The Creditor Plan does not discriminate unfairly and is fair and equitable with respect to each impaired class of claims or interests that did not accept the Creditor Plan.

9. All payments made or to be made by the Proponents or the Liquidating Trustee for services or for costs and expenses in, or in connection with, the Creditor Plan and incident to the case are either approved by the Court as reasonable or are subject to the approval of the Court as reasonable.

10. The identity, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees, if any, of the successor to the debtor under the Creditor Plan after confirmation of the Creditor Plan have been fully disclosed, and the appointment of such person to such offices, or their continuance therein, is equitable, and consistent with the interests of the creditors and equity security holders and with public policy. Specifically, Gary Williams, a vice president at SeaFirst, has been appointed as Liquidating Trustee and Dunigan Petroleum, Inc. will be appointed by the Liquidating Trustee as Operator and their appointment is equitable and consistent with the interests of creditors and equity security holders and with public policy.

11. No insiders are being employed or retained by the Liquidating Trustee. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(B).

12. Confirmation of the Creditor Plan is not likely to be followed by the need for further financial reorganization of the debtor or any successor to the debtor under the Creditor Plan.

13. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9) with respect to the treatment of all known priority claims under 11 U.S.C. § 507.

14. There are no governmental rate changes proposed by the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(6).

15. There are no retiree benefits under 11 U.S.C. § 1114 applicable. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(B).

16. The principal purpose of the Creditor Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. The trust created by the Creditor Plan is a nontaxable grantor trust under subpart E of subchapter J of the Internal Revenue Code. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(d).

17. The effect of the abandonment of the Man-Gas and DCRC stock to Clinton Manges shall be nunc pro tunc as if Manges had owned the stock continuously and the Liquidating Trustee never owned the stock pursuant to Mason v. Commissioner of Internal Revenue, 646 F.2d 1309, 1310 (9th Cir. 1980).

Modifications

18. The following modifications to the Creditor Plan are hereby made and are approved by this Court:

a. The $1.3 million Creditor Fund shall accrue interest at the same rate for SeaFirst market

rate savings accounts. Interest accrued shall supplement the Creditor Fund.

b. Paragraph IV.4.7 of the Creditor Plan is hereby changed to allow for an interim distribution of up to fifty percent rather than thirty percent.

c. Exxon shall be entitled to a Class 17 claim for any royalty it is owed.

d. The Class 3 claimants who are to receive deferred payments shall receive interest in compliance with 11 U.S.C. § 1129(a)(9)(c) at the rate of 10% per annum.

e. The basis for any security for the Class 17 and 18 claimants is Tex. Bus. & Comm. Code § 9-319.

f. The Liquidating Trustee's duties shall include filing and reporting of severance taxes on oil and gas production.

g. The third sentence in paragraph VIII.1 of the Creditor Plan and the third sentence of Article X of the disclosure statement are changed to read: "After Motion Pursuant to the Creditor Plan and a hearing, the Court may eliminate or modify the continuous drilling obligation from the Mobil Lease on grounds of 'economic waste'."

h. The Liquidating Trustee shall pay out of the Creditor Fund to the United States Trustee

the appropriate sum required pursuant to 28 U.S.C. section 1930(a)(6) on the Effective Date of the Creditor Plan and provide to the United States Trustee appropriate documentation including all disbursements for the relevant periods.

i. The basis for any security for the Class 18 claimants shall include section 52.136 of the Texas Natural Resources Code in addition to any security pursuant to Tex. Bus. & Com. Code section 9-319.

j. Article IV.4.4 at page 18 of the Creditor Plan shall be changed to read as follows:

In the event that there is a shortfall in the Production Proceeds Account to meet the above uses of funds, Seattle First National Bank ("SeaFirst") will make advances to this account to accomplish the above uses and if such advances are made, SeaFirst shall be entitled to reimbursement, plus interest, from the Production Proceeds Account for the amounts advanced.

k. The Liquidating Trustee shall have the authority to execute all Texas Railroad Commission forms, including forms P-4, as are necessary to operate the Trust Property and carry out the purposes and intent of the Creditor Plan and the Manges Debtors shall execute all necessary Texas Railroad Commission forms, including forms P-4, as may be necessary to allow the Liquidating Trustee to operate the Trust Property and carry out the purposes and intent of the Creditor Plan.

l. Any interest of any Manges Debtor in any tank batteries and gas pipeline shall be transferred to the Liquidating Trustee under the Blanket Conveyance.

m. All payments made or to be made for services or for costs and expenses in or in connection with the case or in connection with the Creditor Plan and incident to the case, by the Proponents, the Liquidating Trustee, or persons issuing securities or acquiring property under the Creditor Plan for which no administrative expense application for compensation or reimbursement is filed are hereby approved as reasonable. Any such payments for which an administrative expense application for compensation or reimbursement is filed shall be subject to court approval as reasonable.

n. Class 14 is impaired.

o. Class 15 is impaired.

p. Gary Williams, a vice president of SeaFirst, is hereby appointed as Liquidating Trustee.

q. Dunigan Petroleum, Inc. has been chosen as Operator by the Liquidating Trustee.

r. No insiders shall be employed by the Liquidating Trustee. In the event that the Liquidating Trustee desires to employ any insider, an application to the Court shall be made pursuant to the Motion Pursuant to the Creditor Plan

procedure described in Article IV.6.1 of the Creditor Plan.

s. Articles II.14 and II.15 of the Creditor Plan are hereby amended to provide that Marynell Maloney and Vannie Cook Estate shall be eligible for Class 4 unsecured deficiency claims to the extent that their claims may be allowed and to the extent that any security for their claims is not enough to satisfy their claims.

t. All payments owed to the Manges Debtors held by any purchaser of oil or gas, including funds held in suspense by Reata and Coastal, owed on the Confirmation Date shall collectively be termed "Confirmation Date Funds". Immediately upon the signing of this order, all Manges Debtors are enjoined from drawing or otherwise using debtor in possession funds and all financial institutions holding debtor in possession funds are hereby ordered to turn over all debtor in possession funds to the Liquidating Trustee upon presentment of this order. All purchasers of oil and gas or other persons or entities owing money to any Manges Debtor, upon presentment of this order, are hereby enjoined from paying any Manges Debtor, but shall instead pay the Liquidating Trustee all sums that would otherwise be due and payable to any Manges Debtor.

u. In recognition of the undisputed fact that at least $750,000 is owed in base ad valorem tax, the total Class 9 claims shall be allowed to the extent of $750,000. This $750,000 shall be distributed to the Class 9 claimants pro rata, or as

they may agree, within thirty days of the Confirmation Date or within thirty days of the Liquidating Trustee's receipt of all Reata/Coastal Confirmation Date Funds, whichever is later. These funds received by the Class 9 claimants shall reduce their claims accordingly. The Liquidating Trustee shall place all other Confirmation Date Funds in the Production Proceeds Account.

v. The source of payment for the $750,000 shall be the Confirmation Date Funds that are SeaFirst or SFA collateral. In the event that there is not at least $750,000 in Confirmation Date Funds that are SeaFirst or SFA collateral, then SeaFirst shall pay to Class 9 whatever additional sums are necessary to make the $750,000 payment when due.

w. The remaining portion of the Class 9 claims that are ultimately found to be allowed shall bear interest at the rate of 10 percent per annum from the Effective Date until paid.

x. If the collateral that is the source of payment to the allowed Class 9 claimants is not sold within 12 months of the Confirmation Date, then installment payments out of production proceeds shall be made to the allowed Class 9 claimants. The installment payment shall be structured such that the allowed Class 9 claims are paid in full within 36 months of the Confirmation Date. These installment payments shall be made in equal installments, escalating installments, diminishing installments, or any combination of the above, with a balloon payment or payments as is

reasonable in the light of the availability of production proceeds without regard to any contribution by SeaFirst. The reasonableness of the installment payment structure shall be by agreement or determined under the Motion Pursuant to Creditor Plan procedure described in Article IV.6.1 of the Creditor Plan.

y. The following sentences are added to Article IV.4.4(ii): Property taxes for 1990 shall be paid on the Effective Date. Property taxes for 1991 shall be paid on the Effective Date or when due and payable, whichever is later.

z. Article IV.2.1 of the Creditor Plan is hereby amended to read as follows:

IV.2.1. Execution of documents to Effectuate the Creditor Plan. Within three days of the Confirmation Date, the Manges Debtors and Helen Ruth Manges shall execute the Manges Creditor Trust Agreement and Blanket Conveyance establishing the Manges Creditor Trust and transferring all Manges Debtor Estate property to the Manges Creditor Trust, thereby creating Trust Property. Clinton Manges shall retain all property listed as exempt in his schedules filed on about March 14, 1990. There shall be no homestead claim whatsoever in favor of anyone on the Duval County Ranch or on any of the estate or Trust Property. The Manges Creditor Trust Agreement and the Blanket Conveyance shall be substantially in the form as in Appendix 1 and 2, respectively. The Manges Debtors and Helen Ruth Manges shall be under a continuing obligation to execute, within

three days of demand, all documents of any kind to assist in effectuation of the purposes and intent of the Creditor Plan. The Court may order any other person at any time to execute all documents of any kind pursuant to section 1142 to assist in effectuation of the purposes and intent of the Creditor Plan. Pursuant to this provision, by order confirming the Creditor Plan, the Court will order all signatories necessary to carry out the provisions of the Blanket Conveyance to execute the Blanket Conveyance within three days of the Confirmation Date. In the event that the Manges Debtors, Helen Ruth Manges or any other person under an obligation herein to execute documents has not executed documents by the specified deadline, then the Court appoints Colin K. Kaufman to execute documents in the stead of any of the Manges Debtors, Helen Ruth Manges, or any other necessary signatory and such signature by the above appointee shall have the same legal effect as if the Manges Debtors, Helen Ruth Manges, or any other necessary signatory had executed the documents. Further, pursuant to section 1142, the Court orders Colin K. Kaufman to execute documents pursuant to the above appointment within three days of written demand by the Proponents' or the Liquidating Trustee's attorneys. In the event of an appointee execution of a document, there shall be no recourse whatsoever against the appointee, the Court, the Liquidating Trustee, or the Proponents, although there may be recourse against the persons for whom the signatures are being supplied. In the event of any legal or physical incapacity preventing Colin K. Kaufman from executing documents, the Court may appoint a substitute or successor

appointee to execute documents pursuant to this article. The Creditor Plan also shall be as legally effective to transfer and protect title as the Blanket Conveyance and may be publicly recorded instead of the Blanket Conveyance.

aa. Article I.4.10 of the Creditor Plan is hereby amended to read as follows: I.4.10 Confirmation Date. "Confirmation Date" Means the eleventh day after the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. Do not confuse the Confirmation Date with the "Effective Date" the "Consummation Date", or the "Closing Date". "Pre-Confirmation" means that period of time prior to and including the date that the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. "Post-confirmation" means that period of time beginning after the date the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan.

bb. Article I.4.19 of the Creditor Plan is hereby amended to read as follows: I.4.19 Effective Date. "Effective Date" means the ninetieth day after the Confirmation Date. If the Effective Date falls on a Saturday, Sunday or legal holiday under the Federal Rules of Civil Procedure, then the Effective Date shall be the next weekday that is not a legal holiday.

cc. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

dd. Notwithstanding any provision to the contrary, and except as herein provided, all Creditor Fund distributions shall be made within 36 months of the Effective Date (the "Distribution Deadline"). In the event that the Distribution Deadline arrives and all Creditor Fund collection and Eligibility matters are not completed, the Liquidating Trustee shall make Creditor Fund distributions to eligible allowed claimants on the Distribution Deadline and withhold only so much of the Creditor Fund as may be reasonably necessary to cover remaining Creditor Fund Collections and Eligibility Matters.

ee. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

ff. Upon the signing of the order confirming the Creditor Plan, the January 16, 1991 foreclosure on the Duval County Ranch is hereby rescinded and made void ab initio and all liens in existence immediately prior to the foreclosure, including the Proponent's liens, are reinstated in the order of priority that existed immediately prior to the foreclosure. The Blanket Conveyance shall include a provision whereby the Manges Debtors convey the Duval County Ranch to the Liquidating Trustee. The Duval County Ranch shall be Trust Property, and the Liquidating Trustee shall treat the Duval County Ranch and its income as Trust Property under the Creditor Plan. Accordingly, the Liquidating Trustee shall sell the Duval County Ranch pursuant to the Creditor Plan and a lien shall attach on sale proceeds in favor of those creditors, including the Proponents, with liens against the Duval County Ranch

immediately prior to the foreclosure. The effect of this provision shall be to make moot any adversary proceedings, appeals, or other actions or proceedings concerning the lifting of the stay on actions against the Duval County Ranch, the foreclosure on the Duval County Ranch, and the eviction from the Duval County Ranch. In the event that the confirmation of the Creditor Plan is overturned on appeal, denied upon reconsideration, revoked, or otherwise found invalid, then the foreclosure and eviction are reinstated in full and fee title to and the right to possession, dominion, and control of the Duval County Ranch automatically shall revest in Seattle First National Bank without the necessity for any action whatsoever by the Court or the Manges Debtors.

gg. The last unnumbered paragraph of Article IV.2.2 is hereby amended to read: Failure to cooperate fully shall be punishable by any available remedy and specifically by contempt of court; and all reasonable costs and reasonable attorney fees incurred in connection with any such motion for contempt may be assessed against the disobedient party in the court's discretion. The Liquidating Trustee shall be entitled to a writ of execution, writ of assistance, writ of ejection, forcible detainer, or forcible entry and detainer, upon application to the clerk.

hh. The Liquidating Trustee shall provide to the IRS any necessary information returns and shall provide such information to the Manges Debtors as may be reasonably necessary to enable the Manges Debtors to file income tax returns.

ii. Article IV.6.c. and IV.6.d. are hereby modified to read as follows:

c. To invest and reinvest the Trust Property in any demand deposits.

d. To enter into any transaction with respect to the Trust Property despite the fact that another party to any such transaction may be the Proponents.

jj. This liquidating trust shall terminate 36 months from the Effective Date unless the Liquidating Trustee, in his sole discretion, determines that an extension is necessary to complete unfinished duties.

kk. Production Proceeds income shall be distributed annually to SeaFirst except to the extent reasonably necessary to meet Creditor Plan obligations.

ll. In the event that all allowed claims are paid in full, any remaining Trust Property or Creditor Fund money shall revert to the Manges Debtors pro rata.

mm. Notwithstanding any provision that may appear to the contrary, the conveyance of bankruptcy estate property by the Manges Debtors to the Liquidating Trustee pursuant to the Creditor Plan and Blanket Conveyance shall be subject to liens and encumbrances. The Liquidating Trustee shall then sell the Trust Property free and clear of liens with such liens of allowed secured creditors attaching to the sales proceeds or net sales proceeds as provided in the Creditor Plan.

19. The modifications in paragraph 18 supersede all modifications that appeared in the Order Approving Disclosure Statement and Fixing Time for Filing

Acceptances or Rejections of Plan, Combined with Notice Thereof signed by the Court on March 11, 1991.

The Creditor plan filed by Seattle-First National Bank and SeaFirst America Corporation on January 29, 1991, a copy of which is attached hereto, is confirmed as modified herein.

Signed and ordered entered this date: /s/ June 7, 1991, but effectively signed and effective for all purposes on May 31, 1991.

BY THE COURT

/s/ Richard S. Schmidt
RICHARD S. SCHMIDT

UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	NO. 89-01286-C-11
DEBTOR	§	

	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

	§	
CLINTON MANGES	§	NO. 89-01531-C-11
DEBTOR	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 1, 13, and 20, 1991, came on for hearing in the above-referenced Chapter 11 cases the First Amended Original Creditors' Plan of Reorganization ("Creditor Plan") filed by Seattle-First National Bank ("SeaFirst") and SeaFirst America Corporation ("SFA") [collectively, Proponents"]. On May 1, 1991, the initial day of the confirmation hearing, the Proponents presented to the Court a proposed "Order Confirming First Amended Original Creditors' Plan of Reorganization of Seattle-First National Bank and SeaFirst America Corporation ("Confirmation Order"; a copy of which is attached hereto as Exhibit "A"). Paragraph 18 of the Confirmation Order

contains modifications to the Creditor Plan, which the Court has considered in making its ruling.

The debtors, The Law Offices of Royal D. Adams ("Adams"), John E. Cooper ("Cooper"), the Internal Revenue Service ("IRS"), Duval County, Benavides Independent School District, San Diego Independent School District, and Freer Independent School District (collectively, "Taxing Units"], filed objections to the Creditor Plan. The Taxing Units withdrew their objections, attended the confirmation hearing through counsel, and supported confirmation of the Creditor Plan. The IRS attended each day of the confirmation hearing through counsel and announced at the end of the hearing that it did not oppose confirmation of the Creditor Plan. At the conclusion of the hearing, all parties rested and closed, and arguments were presented on May 29, 1991.

Following full evidentiary hearing with notice to all necessary parties, the Court confirms the Creditor Plan as modified, and makes the following findings of fact and conclusions of law with respect to the issue of confirmation. All findings of fact and conclusions of law should be considered in the light of their designation; provided however, findings of fact may be interpreted as conclusions of law and vice versa if such an interpretation is necessary to comply with Federal Rule of Civil Procedure 52.

I.

Findings of Fact

The Court hereby finds the following facts:

A. Regarding Creditor Plan (as modified by the Confirmation Order).

1. The Court generally finds that the Creditor Plan complies with all requirements of 11 U.S.C. § 1129 and other applicable law. All findings should be interpreted as consistent with this general finding, and any omissions in these findings should be construed as an implied finding in support of this general finding based on the evidence presented at the confirmation hearing and the Court's judicial notice of the proceedings and files in these bankruptcy cases and of other litigation and evidence from sources whose accuracy cannot reasonably be questioned. The substantial rights of parties in interest are not affected by minor defects in the Creditor Plan or the evidence presented at the confirmation hearing and the court disregards such defects under the harmless error rule. Bankr. R. 9005; Fed. R. Civ. P. 61.

2. Duval County Ranch Company ("DCRC") filed its voluntary petition in these proceedings for relief under Chapter 11 of the United States Bankruptcy Code on August 14, 1989.

3. Clinton Manges ("Manges") and Man-Gas Transmission Company ("Man-Gas") were made the subjects of separate involuntary petitions for relief under Chapter 11 of the United States Bankruptcy Code filed on October 2, 1989.

4. An order for relief in the Manges bankruptcy was entered on March 8, 1990.

5. An order for relief in the Man-Gas bankruptcy was entered on April 4, 1990.

6. On January 4, 1991, the debtors filed their Third Amended Plan of Reorganization as modified ("Debtors Plan").

7. On January 16, 1991, the United States Marshal for the Southern District conducted a judicial sale of the 99,000 acre Duval County Ranch, which had previously been property of the DCRC bankruptcy estate. SeaFirst was the purchaser at the sale.

8. Confirmation of the debtors' plan was denied on January 26, 1991.

9. On or about January 29, 1991, the Proponents filed the Creditor Plan and its First Amended Original Disclosure Statement to First Amended Original Creditors Plan of Reorganization of Seattle-First National Bank and SeaFirst America Corporation ("Disclosure Statement").

10. The Court approved the Disclosure Statement as containing adequate information under 11 U.S.C. § 1125 in an Order Approving Disclosure Statement and Fixing Time for Filing Acceptances and Rejections of Plan, Combined with Notice Thereof ("Disclosure Statement Order") dated March 11, 1991. The Disclosure Statement Order contained certain modifications to the Creditor Plan that were approved by the Court.

11. A copy of the Creditor Plan, the Disclosure Statement, the Disclosure Statement Order, and court-approved ballots were transmitted to all persons requiring notice in compliance with the Disclosure Statement Order and the Bankruptcy Rules.

12. The solicitation of votes on the Creditor Plan by the Proponents was proper in all respects.

13. Based on the totality of the circumstances, the Creditor Plan has been proposed in good faith and not by any means forbidden by law in compliance with 11 U.S.C. § 1129(a)(3). Specifically,

(a) Votes on the Creditor Plan were solicited by a proper court-approved disclosure statement and in compliance with the Bankruptcy Code, Bankruptcy Rules and case law concerning solicitation of votes;

(b) The Creditor Plan does not contain any provision inconsistent with the interests of creditors or public policy;

(c) The Proponents intend to carry out the Creditor Plan to full consummation;

(d) The evidence submitted in support of objections concerning lack of good faith are mere suspicions, conclusions, and speculation and amount to little more than a scintilla of evidence; and

(e) There has been no objection or evidence that the Creditor Plan was proposed by means forbidden by law and the Court presumes compliance with the law under Bankr. R. 3020(b)(2).

14. The Proponents have complied with the applicable provisions of Title 11. Accordingly, the requirements of 11 U.S.C. § 1129(a)(2) have been met.

15. The Creditor Plan complies with the applicable provisions of Title 11, including 11 U.S.C. §§ 1122-1127. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(1).

16. The Creditor Plan contains all provisions required by 11 U.S.C. § 1123 and contains no provisions prohibited under 11 U.S.C. § 1123.

17. The Creditor Plan provides adequate means for its implementation. The Creditor Plan creates a liquidating creditor trust. The trust will be managed by a Liquidating Trustee, who is an employee of SeaFirst who will serve without compensation from the estates or the trust. Under the Creditor Plan, all property of the bankruptcy estates is transferred to the Liquidating Trust. Part of the estate property transferred to the Liquidating Trust will be oil and gas interests. In addition, the Creditor Plan provides that the January 16, 1991 sale be voided ab initio and the Duval County Ranch simultaneously transferred to the Liquidating Trust. The Liquidating Trustee will manage the property, sell the property, and distribute the net sales proceeds to creditors holding allowed secured claims against the property.

During the interim between confirmation and sale, proceeds may be generated from oil and gas operations, which are called Production Proceeds. These Production Proceeds are generally the collateral of SeaFirst and those proceeds will generally provide the operating funds for the Liquidating Trustee. SeaFirst will make advances to the Production Proceeds to assure adequate cash flow and feasibility. The administrative claims, priority claims (except Class 3 government claims, which shall be paid from its or SeaFirst's collateral), and unsecured claims that are allowed are to be paid from a $1.3 million Creditor Fund, which has been contributed by SeaFirst. The Creditor Fund may be enhanced by voidable transfer litigation and from any excess from the sales of property. Recovery by the general unsecured creditors is further enhanced by the Proponents' waiver of an estimated $1.7 million in administrative expenses and voluntary subordination of SeaFirst's estimated $36 million unsecured claim (the secured claim of SeaFirst shall be established by the sale of its collateral). In the event that all allowed claims are paid in full, the debtors shall receive any excess. With certain exceptions, the Creditor Plan terminates three years from its effective date.

18. The Creditor Plan specifies classes of claims and interests and properly classifies claims and interests. Each class contains claims that are substantially similar and no classes contain substantially dissimilar claims. The Creditor Plan complies with 11 U.S.C. §§ 1122 and 1123(a)(1).

19. The Creditor Plan specifies which classes are impaired and unimpaired and specifies the treatment of those classes. The Creditor Plan complies with 11 U.S.C. § 1123(a)(2) and (3).

20. The Creditor Plan provides for the same treatment for each claim or interest holder of a particular class. The Creditor Plan complies with 11 U.S.C. §§ 1123(a)(4) and 1129(b)(1).

21. All payments made or to be made by the Proponents or the Liquidating Trustee for services or for costs and expenses in, or in connection with, the Creditor Plan and incident to the case are either approved by the Court as reasonable or are subject to the approval of the Court as reasonable. Specifically, the Proponents have incurred preconfirmation costs of approximately $1.5 million in connection with these three bankruptcies. The Proponents assert no administrative expense claim for these costs and the Creditor Plan provides for application and court approval for any fees for which an administrative expense claim is filed. This is sufficient compliance with section 1129(a)(4). See In re Texaco, Inc., 84 Bankr. 893, 908 (Bankr. S.D.N.Y. 1988) (suggesting that section 1129(a)(4) does not require court approval for fees for which no fee application is necessary). In addition, since the fees and costs are paid from outside the bankruptcy estate, the Court cannot order disgorgement of the fees. Matter of Hargis, 887 F.2d 77, 79 (5th Cir. 1989). Further, the Court takes judicial notice of the proceedings in which the Proponents have been involved and finds that the preconfirmation attorneys' fees and costs are reasonable under the standards of In re First Colonial Corp. of America, 544 F.2d 1291 (5th Cir. 1988), especially in the light of the fact that the fees will not be an administrative expense. Certain post-confirmation fees and costs concerning Creditor Fund matters are subject to court approval as reasonable pursuant to Creditor Plan Article V.5 at page 29. Other post-confirmation fees will be paid by the

Proponents from their Production Proceeds under Creditor Plan Article IV and, accordingly, are reasonable.

22. The identity, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees, of the successor to the debtors under the Creditor Plan after confirmation of the Creditor Plan are irrelevant because there will not be any such positions. The Creditor Plan and Disclosure Statement disclosed that the Liquidating Trustee may be an employee of the Proponents. Gary Williams is a vice president of SeaFirst and has been appointed as Liquidating Trustee. Mr. Williams is qualified to manage and liquidate assets of the trust. In addition, any potential conflict of interest between Mr. Williams and the creditors is outweighed by the benefit of Mr. Williams' appointment, by the protective provisions of Creditor Plan Articles IV. 6.1 and IV. 7.d, and by the overall benefits of the Creditor Plan. These benefits include:

(a) the Proponents' contribution of the $1.3 million Creditor Fund;

(b) the Proponents' waiver of their approximate $1.7 million administrative expense claims;

(c) SeaFirst's voluntary subordination of its unsecured claim;

(d) the fact that Mr. Williams' services are free of charge, while the cost of hiring an independent trustee would be tremendous; and

(e) the fact that most of the collateral is the Proponents' collateral.

Accordingly, Mr. Williams' appointment is equitable and consistent with the interests of creditors and equity security holders and with public policy. The Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(A).

23. No insiders are being employed or retained by the Liquidating Trustee. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(B).

24. Each holder of a claim or interest that has not accepted the Creditor Plan will receive or retain under the Creditor Plan property of a value, as of the effective date of the Creditor Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date. Specifically, nonaccepting claimholders and interest holders in any of these bankruptcies would receive no distribution in a chapter 7 liquidation. No creditors made an election under 11 U.S.C. § 1111(b). The Creditor Plan complies with 11 U.S.C. § 1129(a)(7).

25. Classes 14 and 15 were timely served with the Creditor Plan, Disclosure Statement, Disclosure Statement Order, and court-approved ballots.

26. The Creditor Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law. Specifically, classes 3, 5, 6, 7, 8, 9, 10, 17, and 18 are impaired and have accepted the Creditor Plan, without considering the votes of insiders. The Creditor Plan complies with 11 U.S.C. § 1129(a)(10).

27. The Proponents requested confirmation of the Creditor Plan under the cramdown provisions of 11 U.S.C. § 1129(b).

28. The Creditor Plan does not discriminate unfairly with respect to any class of impaired creditors and interest holders that did not accept the Creditor Plan. The Creditor Plan complies with 11 U.S.C. § 1129(b)(l).

29. As of the date of the initial hearing on confirmation, no class of secured creditors rejected the Creditor Plan. Additionally, the Creditor Plan does not unfairly discriminate and is fair and equitable with respect to all secured creditors. The Creditor Plan provides for the sale of trust property free and clear of liens with those allowed liens attaching to the sales proceeds, for the payment of interest to the secured claimants, and for the payment of the indubitable equivalent of the allowed secured claims to the secured creditors. The Creditor Plan complies with 11 U.S.C. § 1129(b)(2)(A).

30. The Creditor Plan is fair and equitable with respect to all classes of impaired unsecured creditors who did not accept the Creditor Plan. Specifically, the Creditor Plan provides for a Creditor Fund and other assets to make payment on these claims and no holder of any claim or interest that is junior to the unsecured claims is receiving or retaining any property. The Creditor Plan complies with 11 U.S.C. § 1129(b)(2)(B).

31. The Creditor Plan is fair and equitable to the equity security holder of DCRC and Man-Gas, and to Manges individually. The Creditor Plan complies with § 1129(b)(2)(C). Specifically:

(a) No one junior to Manges is receiving any property under the Creditor Plan.

(b) In addition, Manges shall receive a complete discharge under 11 U.S.C. § 1141 unless a party in interest prevails on a discharge or dischargeability complaint.

(c) There should not be any significant post-confirmation income tax liability to Manges due to the availability of tax attributes, the value of the collateral, the availability of subchapter S termination, and the lack of personal liability to Manges for DCRC's taxes.

(d) Even in the event that the debtors are faced with post-confirmation tax liability, the Creditor Plan is not unfair or inequitable since the debtors have had the benefit of the prepetition use of money and property without the burden of paying taxes.

32. Confirmation of the Creditor Plan is not likely to be followed by the need for further financial reorganization or liquidation of the debtors or any successor to the debtors under the Creditor Plan. In addition, the Creditor Plan proposes liquidation, obviating a need for a finding under 11 U.S.C. § 1129(a)(11). In re Pero Brothers Farms Inc., 90 Bankr. 562, 563 (Bankr. S.D.

Fla. 1988). The Creditor Plan complies with 11 U.S.C. § 1129(a)(ll).

33. The Creditor Plan is feasible:

(a) it is a liquidating plan, so section 1129(a)(11) does not apply;

(b) the $1.3 million Creditor Fund is on hand and available for distribution;

(c) there is a significant likelihood of distribution within a reasonable time from the Creditor Fund to the allowed unsecured claimants due to the waiver and subordination of certain SeaFirst claims and the payment of other claimants from collateral;

(d) SeaFirst will make advances to the Production Proceeds account to ensure feasibility and SeaFirst has the financial ability to perform on this obligation; and

(e) there is no objection or evidence that the Liquidating Trustee will not do what he is required to do by the Creditor Plan, making such plan feasible as a liquidation. In re Elm Creek Joint Venture, 93 Bankr. 105, 110 (Bankr. W.D. Tex. 1988).

34. Allowed Class 3 government claims under 11 U.S.C. § 507(a)(7) will be paid deferred cash payments, plus ten percent interest, over a period not exceeding six years from the date of assessment. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9)(C).

35. Allowed priority claims under 11 U.S.C. § 507 shall be paid on the effective date. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9)(A) and (B).

36. There are no governmental rate changes proposed by the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(6).

37. There are no retiree benefits applicable to these cases. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(13).

38. The principal purpose of the Creditor Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. No governmental entity raised an objection under 11 U.S.C. § 1129(d). The Creditor Plan complies with 11 U.S.C. § 1129(d).

39. The Creditor Plan provides for payment to the United States Trustee of the appropriate sums required by 28 U.S.C. § 1930(a)(6) on the effective date and for the provision of appropriate documentation to the United States Trustee for disbursement for relevant periods. The Creditor Plan complies with 11 U.S.C. § 1129(a)(12).

40. There will not be any federal income tax effects from the transfer of estate property to the liquidating trust.

41. The Creditor Plan creates a trust that is a nontaxable grantor trust under subpart E of subchapter J of the Internal Revenue Code.

42. The trust created by the Creditor Plan is not a partnership, corporation, or similar business association and is not a common-law or Texas Trust Code trust.

43. The debtors are both the grantors and the beneficiaries of the grantor trust created by the Creditor Plan. The debtors are grantors because their bankruptcy estate property is used to fund the trust and they are beneficiaries because the trust property will be used to pay the debtors' legal obligations.

44. The Liquidating Trustee is not a trustee under Title 11 and is not a fiduciary, but is a contract trustee.

45. Under the Creditor Plan, the Liquidating Trustee's duties are ministerial in nature and he functions as a liquidating agent with regard to his activities under the Creditor Plan. Specifically, the Liquidating Trustee is under a duty to liquidate trust property and has no discretion but to do so. In addition, the Liquidating Trustee has no discretion on how to distribute trust property proceeds and Creditor Fund monies because the distribution must be in accordance with the Creditor Plan.

46. The stock of DCRC and Man-Gas is being abandoned to Manges. Each debtor will retain whatever tax attributes are available as of the date of confirmation.

47. The trust created by the Creditor Plan:

(a) is for the primary purpose of liquidating trust assets with no objective to carry on a trade or business;

(b) contains a termination date of 36 months from the effective date;

(c) provides that the Liquidating Trustee's investment powers are generally limited to demand deposits;

(d) is not receiving transfers of any significant listed stocks or securities, any readily marketable assets, or any operating assets of a going business;

(e) is not receiving and will not retain cash in excess of a reasonable amount to meet claims and contingent liabilities;

(f) is not receiving any significant transfers of any unlisted stock of a single issuer that represents 80 percent or more of the stock of such issuer;

(g) is not receiving transfers of any general or limited partnership interests; and

(h) requires the Liquidating Trustee to distribute at least annually the proceeds from the sale of assets or income from investments.

48. There is no equity in any of the property of the estates subject to liens. The value of the secured claims shall be determined by the sales price for the collateral.

49. Since the Creditor Plan provides for the sale of all property of the estates, the sale price shall determine the value and, accordingly, the amount of secured claims.

50. The Creditor Plan places only property of the bankruptcy estates of DCRC, Man-Gas and Clinton Manges into the trust and does not attempt to exercise jurisdiction over any other property. No property rights of Helen Ruth Manges are affected by the Creditor Plan.

51. The March l, 1979 warranty deed concerning 201.11 acres of the Duval County Ranch described in the February 25, 1991 Motion to Enforce Automatic Stay and For Cancellation of Fraudulent Void Transfer in the DCRC bankruptcy case is void as unperfected on the date of the DCRC bankruptcy petition and the February 11, 1991 recording of that warranty deed is void as an act in violation of the automatic stay in DCRC's bankruptcy case.

52. No homestead has been properly claimed by any debtor or any dependent of any debtor in any of these

bankruptcy cases and the time for the debtors and their dependents to claim a homestead has expired.

53. There is no homestead in favor of anyone on the Duval County Ranch or any of the bankruptcy estate or trust property.

54. The debtors and Helen Ruth Manges are bound by the collateral estoppel effect of two federal court judgments that there is no homestead on the Duval County Ranch. The property that was alleged to be homestead at the confirmation hearing is the same property that was found not to be homestead in these two final judgments. Had Helen Ruth Manges claimed a homestead on the property, her claim would have been barred by collateral estoppel.

55. All non-exempt property scheduled by Clinton Manges in his bankruptcy schedules of March 14, 1990, is either his separate property or his sole management community property and is therefore property of his bankrupt estate that is transferred to the trust under the Creditor Plan. Those schedules show "other evidence of ownership" or possession raising a presumption, which was unrebutted, of sole management community property of Clinton Manges. See Tex. Fam. Code Ann. § 5.24 (Vernon 1975).

56. Helen Ruth Manges had actual notice of the Creditor Plan sufficient to afford her an opportunity to be heard at the confirmation hearing. Clinton Manges discussed the Creditor Plan with Helen Ruth Manges. David Towler, an attorney who represents Helen Ruth Manges on other matters, also discussed the Creditor Plan with her. Helen Ruth Manges failed to object or appear

at the confirmation hearing and therefore waived any procedural or substantive objections to the Creditor Plan and is accordingly bound by the Creditor Plan.

57. Based on this court's judicial notice of the claims on file and the proceedings in these bankruptcy cases, and the lack of evidence suggesting any other disposition, the Creditor Plan's disposition of pending litigation under Article V of the Creditor Plan is proper, fair, and equitable in accordance with In re Texaco Inc., 84 Bankr. 893, 901-02 (Bankr. S.D.N.Y. 1988) and cases cited therein. Specifically, the Court finds that the following adversary proceedings concern matters that have not been actively prosecuted or that have no significant value to the estates, and accordingly their dismissal with prejudice is proper:

(a) Man-Gas Transmission Co. and Clinton Manges v. First City Texas-Houston N.A. d/b/a First City Texas-McAllen, John Hughes, and Winn Exploration Co., Inc.; Adversary No. 90-0121-C;

(b) Duval County Ranch Company v. Seattle-First National Bank and SeaFirst America Corporation, Adversary No. 90-0152-C;

(c) Alberto Garza Uresti, Abelardo Ramos, Juan I. Barrera, Jose Luis Sifuentes, Jesus Angel Saenz, Ernesto A. Rodriguez, Damingo S. Cadena,

and Martin Benitez v. Duval County Ranch Co., Adversary No. 89-0200; and

(d) Duval County Ranch Company v. Seattle-First National Bank and McCamish, Martin, Brown & Loeffler, A Professional Corporation, Adversary No. 89-0143-C.

58. The debtors have issued consolidated financial statements to third parties.

59. Manges own all of the stock in DCRC and Man-Gas.

60. The debtors have commingled assets and business functions in the past.

61. Segregating assets and liabilities of the separate debtors would cause unnecessary expense and delay in administration.

62. The debtors have transferred property among themselves without observing corporate formalities.

63. The debtors have engaged in intercompany transfers.

64. The debtors have jointly guaranteed debts.

65. The substantive consolidation of the estates under the Creditor Plan is equitable and beneficial to all creditors. The debtors and nonconsenting creditors are

not harmed by the substantive consolidation. The secured creditors are not affected by the consolidation. In the absence of consolidation under the Creditor Plan, the unsecured creditors would receive nothing. The creditors will suffer greater harm in the absence of the consolidation than the debtors and nonconsenting creditors will suffer from its imposition.

66. Class 16 is a class of $1,000 or less claims or those who will reduce their claims to $1,000 or less. The Court approves the establishment and treatment of Class 16 as reasonable and necessary for administrative convenience. Specifically, since it is unlikely that anyone will object to Class 16 claims, it is convenient to allow those claims and pay them early to avoid delay and to effect earlier consummation of the Creditor Plan. Further, the treatment of Class 16 does not unfairly discriminate against other unsecured creditors. The claims are small and the impact of their payment on other creditors is de minimis. Any creditor can elect to be in Class 16. The Proponents are providing the Creditor Fund from outside the estate and without the Creditor Plan the unsecured creditors would receive nothing. If there is discrimination, it is not unfair.

67. The modifications in the Confirmation Order supersede all previous modifications that appeared in the Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof signed by the Court on March 11, 1991.

68. The modifications in the Confirmation Order do not materially or adversely affect any creditor who voted in favor of the Creditor Plan and no Creditor who

voted in favor of the Creditor Plan would be likely to reconsider its vote based on the modifications. The Proponents do not seek to resolicit votes from creditors that did not accept the Creditor Plan. Accordingly, the modifications are among those allowed without the need to renotice creditors and are proper under 11 U.S.C. § 1127, Bankruptcy Rule 3018, and In re American Solar King Corp., 90 Bankr. 808, 823 (Bankr. W.D. Tex. 1988).

69. This Court has jurisdiction over this proceeding and this is a core proceeding. 28 U.S.C. §§ 1334 and 157(b)(2)(L).

II.

Conclusions of Law

Based upon the foregoing findings of fact, the Court concludes the following:

A. Regarding the Creditor Plan as modified in the Confirmation Order.

1. The bankruptcy court is a court of equity; substance will not give way to form and technical considerations will not prevent substantial justice from being done. Pepper v. Litton, 308 U.S. 295, 304-05 (1939).

2. The harmless error rule of Bankruptcy Rule 9005 applies in plan confirmation proceedings, and a plan should not be rejected due to technical and insubstantial violations of the bankruptcy code. See In re Johns-Manville, 843 F.2d 636, 648 (2d Cir. 1988). Federal Rule of Civil Procedure 61 applies in cases under the bankruptcy code; when appropriate, the court may order

the correction of any error or defect or the cure of any omission that does not affect substantial rights. Bankr. R. 9005. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Fed. R. Civ. P. 61.

3. The bankruptcy court may take judicial notice of its own records, including docket entries and pleadings filed. Securities and Exchange Commission v. First Financial Group of Texas, 645 F.2d 429, 433 n.6 (5th Cir. 1981). A court may take judicial notice, whether requested or not, at any stage of a proceeding. Fed. R. Evid. 201(c),(f).

4. A plan must be proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1129(a)(3). Section 1129(a)(3) refers to the proposal of the plan, not to the conduct of the case. In re Madison Motel Assoc., 749 F.2d 410, 425 (11th Cir. 1984). Good faith under section 1129(a)(3) is based on the totality of the circumstances. In re Sun Country Dev. Inc., 764 F.2d 406, 408 (5th Cir. 1985). The issue of good faith is whether the plan represents a legitimate pursuit of reorganization and not an attempt to abuse the confirmation process to achieve some improper purpose. Id. A plan is proposed in good faith when there is a reasonable likelihood that the plan will achieve a result consistent with the purposes of the bankruptcy code. In re Stolrow's Inc.. 84 Bankr. 167, 172 (9th Cir. B.A.P. 1988); In re Mikron, Inc., 27 Bankr. 773, 778 (Bankr. E.D. Mich. 1983). Good faith includes an intent to follow through with consummation of the plan. In re Koebl, 752 F.2d 137, 139 (2d Cir. 1984). One proper purpose of a chapter

11 plan is liquidation. 11 U.S.C. § 1123(a)(5); In re Jasik, 727 F.2d 1379, 1382 (5th Cir. 1984).

5. If no objection is filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues. Bankr. R. 3020(b)(2). While an objection concerning lack of good faith was filed, no objection was filed alleging that the Creditor Plan was proposed by means forbidden by law and no credible evidence has been brought forth by the objectors concerning either matter. It is inappropriate for a court to deny confirmation under section 1129(a) (3) (good faith) solely on the basis of the objector's suspicion that post-confirmation obligations will not be carried out. See In re Future Energy Corp., 83 Bankr. 470, 487 (Bankr. S.D. Ohio 1988). The evidence supporting compliance with section 1129(a)(3) includes the courts' judicial notice of the approved disclosure statement and the certificate of service for the Creditor Plan on file and the testimony of the Proponents' witnesses that they intend to carry out the Creditor Plan to full consummation. Accordingly, the Creditor Plan complies with section 1129(a)(3).

6. There is no bankruptcy estate after confirmation of a chapter 11 plan and there can therefore be no administrative expense claims for post confirmation activities and costs. In re Frank Meador Buick, Inc., 65 Bankr. 200, 203 (D.W.D. Va. 1986); In re Barker Medical Company, Inc., 55 Bankr. 435, 436 (Bankr. M.D. Ala. 1985); In re Page, 118 Bankr. 456, 459 (Bankr. N.D. Tex. 1990).

7. The purpose of section 1129(a)(4) is to protect the integrity of the bankruptcy estate since attorney fees

and costs are subject to priority under section 507 and insure that holders of claims have the benefit of such information that might afford the claimants' decision to accept or reject the plan. See In re Future Energy Corp., 83 Bankr. 470, 488 (Bankr. S.D. Ohio 1988).

8. A statement in a chapter 11 plan that attorney fees and costs be subject to court approval is not necessary to achieve compliance with section 1129(a)(4). See In re Future Energy Corp. 83 Bankr. 470, 488 (Bankr. S.D. Ohio 1988).

9. Disclosure that preconfirmation and post-confirmation costs, expenses and attorney fees of the Proponents will not be borne by the bankruptcy estate is sufficient for the court to approve such costs, expenses and fees as reasonable under 11 U.S.C. § 1129(a)(4). See In re Texaco, Inc., 84 Bankr. 893, 908 (Bankr. S.D.N.Y. 1988). In addition, under Matter of Hargis, 887 F.2d 77, 79 (5th Cir. 1989), since the Court cannot order disgorgement of attorney fees that came from a source outside the bankruptcy estate, such costs and fees are approved as reasonable.

10. There is no bankruptcy code requirement that persons serving post-confirmation as the successor to the debtor have no conflicts of interest with the creditors.

11. Section 336 of the Internal Revenue Code does not apply to grantor trusts. See 26 U.S.C. § 336.

12. Voiding ab initio the January 16, 1991 sale of the Duval County Ranch eliminates any administrative expense claim due to any gain on such sale and the basis existing in the Duval County Ranch prior to the

foreclosure carries forward as DCRC's tax basis in the property. See Revenue Ruling 80-58, 198-1 C.B. 181.

13. Post-confirmation taxes are not recoverable as administrative expenses under 11 U.S.C. § 503. In re Holywell Corp., 911 F.2d 1539, 1544 (11th Cir. 1990).

14. A trustee appointed pursuant to a chapter 11 plan who is not appointed under 11 U.S.C. § 1104(a) is not a "trustee in a case under title 11 of the United States Code, or assignee", and is therefore not subject to the requirements of 26 U.S.C. §§ 6012 and 6151. In re Holywell Corp., 911 F.2d 1539, 1545 (11th Cir. 1990).

15. Since the Creditor Plan creates a nontaxable grantor trust, the Liquidating Trustee shall not be under any duty to prepare and file federal income tax returns (other than information returns) or pay income taxes on preconfirmation or post-confirmation income of any kind, whether from capital gains, operations, interest or otherwise and the duty to prepare and file federal income tax returns and pay federal income taxes shall be the sole responsibility of the Manges Debtors. See In re Holywell Corp., 911 F.2d 1539, 1541 (11th Cir. 1990); Stockton v. United States, 335 F. Supp. 984, 986 (C.D. Calif. 1971); In re Sonner, 53 Bankr. 859, 864 (Bankr. E.D. Va. 1985).

16. The filing of a petition in bankruptcy creates a legal estate comprising "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). In the case of a married debtor in a community property state, the bankruptcy estate includes all interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is under the sole equal or joint management and

control of the debtor. 11 U.S.C. § 541(a)(2). Community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by him or her before or during the marriage. Tex. Fam. Code Ann. § 5.61(c) (Vernon 1975); Carlton v. Estes, 664 S.W.2d 322, 323 (Tex. 1984). During marriage, property is presumed to be the sole management property of a spouse if it is held in that spouse's name or there is other evidence of ownership. Tex. Fam. Code Ann. § 5.24 (Vernon 1985). This Court has exclusive in rem jurisdiction over all property of these bankruptcy estates wherever located and by whomever held. 28 U.S.C. § 1334(d); 28 U.S.C. §157(a); Slay Warehousing Co. v. Modern Boats, Inc., 775 F.2d 619, 620 (5th Cir. 1985).

17. The joinder of Helen Ruth Manges, a nondebtor, is not necessary for this court to make in rem orders with respect to community property that is the sole or joint management community property or separate property of Clinton Manges because such property is property of the bankruptcy estate. 11 U.S.C. § 541(a)(2); In re Halub, 35 Bankr. 617, 619 (Bankr. C.D. Calif. 1982); Tex. Fam. Code Ann. § 5.61(c) (Vernon 1975); Carlton v. Estes, 664 S.W.2d 322, 323 (Tex. 1984). Since Helen Ruth Manges had actual knowledge of the Creditor Plan and an opportunity to be heard, and since the injunctive provisions concerning her under the Creditor Plan are in rem orders, no proceeding against Helen Ruth Manges is required to order her compliance with Creditor Plan provisions.

18. Under 11 U.S.C. § 1142, Bankruptcy Rule 7065, Federal Rule of Civil Procedure 65(d), and United States v. Hall, 472 F.2d 261, 265-66 (5th Cir. 1972), this court may issue orders to nonparties in the exercise of its

in rem jurisdiction over property of the estate binding upon those persons who receive actual notice of the order.

19. Since Helen Ruth Manges had actual notice of the Creditor Plan, she has not been denied due process. EEOC v. Pan American World Airways, Inc., 897 F.2d 1499, 1508 (9th Cir. 1990) (actual knowledge of the pendency of an action removes any due process concerns about notice of litigation); In re DCA Development Corporation, 489 F.2d 43, 47 (1st Cir. 1983) ("even where formal notice to affected parties is omitted or is insufficient, informal or constructive notice which provides them with the same opportunity for a fair hearing can satisfy the procedural requirements of the Bankruptcy Act"). See also In re Compton, 891 F.2d 1180, 1185 (5th Cir. 1990) (misscheduled creditor with actual knowledge of general bankruptcy not excused from missing dischargeability deadline).

20. Any party in interest may file an objection to a chapter 11 plan. 11 U.S.C. § 1128(b). When an objection to a chapter 11 plan is filed, the confirmation hearing is a contested matter. Bankr. R. 3020(b)(1); 9014. Federal Rule of Civil Procedure 19 (concerning joinder of parties) is not applicable to contested matters. Bankr. R. 9014. The procedure in chapter 11 is clear: a party in interest is not required to be "joined" in a confirmation hearing. One must file an objection under section 1128(b) in order to be a party. Helen Ruth Manges, as a party in interest with notice of the Creditor Plan, could have filed an objection but she did not. She has therefore waived any objections as to procedural irregularity. See In re Great Lakes Steel & Fabricating Industries, Inc., 83 Bankr; 1015, 1016 n.1 (Bankr. N.D. Ind. 1988); see also In re The Landing Associates, Ltd., 122 Bankr. 288, 292 (Bankr.

W.D. Tex. 1990); In re C.M. Turtur Investments, 93 Bankr. 526, 527 (Bankr. S.D. Tex. 1988); In re Prescott College, 10 Bankr. 316, 321 (D. Ariz. 1981); In re Gregory, 705 F.2d 1118, 1123 (9th Cir. B.A.P. 1983).

21. Only natural persons may have a homestead and corporations may not have a homestead. Tex. Const. art. XVI §§ 50, 51 (1876 amended 1973); Tex. Prop. Code Ann. § 41.002 (Vernon Supp. 1991); Shepler v. Kubena, 563 S.W.2d 382, 386 (Tex. Civ. App. --Austin 1978, no writ); Op. Tex. Atty. Gen. No. JM-612 (1986). Only individual debtors may claim a homestead exemption in bankruptcy. 11 U.S.C. § 522(b).

22. Parties in bankruptcy are bound by factual issues decided in prior judgments under the principle of collateral estoppel. Montana v. United States, 440 U.S. 147, 153 (1979); In re Shuler, 722 F.2d 1253, 1255 (5th Cir. 1984), cert. denied, 469 U.S. 817 (1984).

23. Substantive consolidation arises from the general equitable powers of the bankruptcy court under 11 U.S.C. § 105(a). In re Gainesville P-H Properties, Inc., 106 Bankr. 304, 305 (Bankr. M.D. Fla. 1989). The sole purpose of substantive consolidation is to ensure equitable treatment of all creditors. In re Augie/Restivo Baking Co. Ltd., 860 F.2d 515, 518 (2d Cir. 1988). The standard for granting substantive consolidation is that the creditors will suffer greater prejudice in the absence of consolidation than the debtors and any objecting creditors will suffer from its imposition. In re Steury, 94 Bankr. 553, 554-555 (Bankr. N.D. Ind. 1988).

24. Bankruptcy courts should consider the following factors when deciding whether substantive consolidation is proper:

(a) the presence or absence of consolidated financial statements;

(b) the unity of interests and ownership between the various corporate entities;

(c) the existence of parent and intercorporate guaranties on loans;

(d) the degree of difficulty in segregating and asserting individual assets and liabilities;

(e) the transfer of assets without financial observance of corporate formalities;

(f) the commingling of assets and business functions; and

(g) the profitability of consolidation at a single physical location.

In re Mortgage Investment Co. of El Paso, Texas, 111 Bankr. 604, 610 (Bankr. W.D. Tex. 1990).

25. A chapter 11 plan may provide for the settlement or adjustment of any claim belonging to the debtor or to the estate, 11 U.S.C. § 1123(b)(3), and a compromise involving claims of other parties may be

effected by a chapter 11 plan if it is fair and equitable. In re Texaco, Inc., 84 Bankr. 893, 901 (Bankr. S.D.N.Y. 1988).

26. There is no requirement under 11 U.S.C. § 1129(a)(11) that a finding be made that there be no need for the further reorganization or likelihood of liquidation of the debtor in the case of a creditor trust liquidating plan. 11 U.S.C. § 1129(a)(11); Matter of 47th & Belleview Partners, 95 Bankr. 117, 120 (Bankr. W.D. Mo. 1988); In re Pero Brothers Farms, Inc., 90 Bankr. 562, 563 (Bankr. S.D. Fla. 1988). In any event, the only test for feasibility in connection with a liquidating plan is whether the proponent can perform the plan provisions after confirmation. See In re Jorgenson, 66 Bankr. 104, 108 (9th Cir. B.A.P. 1986); In re Elm Creek Joint Venture, 93 Bankr. 105, 110 (Bankr. W.D. Tex. 1988).

27. It is a fundamental concept that the best evidence of what a property is worth is what it brings on the open market. In re Energy Cooperative, Inc., 109 Bankr. 822, 824 (N.D. Ill. 1989).

28. In the event of a post-vote modification of a chapter 11 plan, further disclosure is only required when the proponent either intends to solicit votes from previously dissenting creditors or when the modification materially and adversely affects creditors who previously voted for the plan. In re American Solar King Corp., 90 Bankr. 808, 823 (Bankr. W.D. Tex. 1988). A modification is material if it so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance. Id.

An order confirming the Creditor Plan shall issue in accordance with these findings and conclusions.

SIGNED and ORDERED ENTERED: June 7, 1991.

/s/Richard S. Schmidt
RICHARD S. SCHMIDT
UNITED STATES BANKRUPTCY JUDGE

After entry, copies to: J. Patrick Deely, Kevin M. Warburton, Sam Dibrell, Kent M. Rider, Arthur Zeitler, Jose N. Rangel, Larry Ludka, Margaret K. Hoffman, O'Neal Munn, John S. Warren, Jack Langlois, David D. Towler, Kathy Kirk, John E. Cooper, Richard L. Fuqua, Craig T. Cowgill, Bennett Fisher and Ben Head.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	NO. 89-01286-C-11
DEBTOR	§	

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	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

CLINTON MANGES,	§	
DEBTOR	§	NO. 89-01531-C-11

ORDER CONFIRMING FIRST AMENDED CREDITORS' PLAN OF REORGANIZATION OF SEATTLE FIRST NATIONAL BANK AND SEAFIRST AMERICA CORPORATION

After proper notice and a hearing, this Court has considered the First Amended Creditors' Plan of Reorganization of Seattle First National Bank and SeaFirst America Corporation under chapter 11 of the Bankruptcy Code filed by Seattle-First National Bank ("SeaFirst") and SeaFirst America Corporation ("SFA") [collectively "the Proponents") on January 29, 1991 (the "Creditor Plan") and finds:

EXHIBIT A

1. A copy of the Creditor Plan, its approved disclosure statement, the order approving the disclosure statement, and court-approved ballots were transmitted to all persons requiring notice.

2. The solicitation of votes on the Creditor Plan by the Proponents was proper in all respects.

3. The Creditor Plan has been accepted in writing by the creditors and equity security holders whose acceptance is required by law. Specifically Classes 3, 5, 6, 7, 8, 9, 10, 17, and 18 are impaired and have accepted the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. §1129(a)(10).

4. The Creditor Plan complies with the applicable provisions of title 11.

5. The Proponents of the Creditor Plan have complied with the applicable provisions of title 11.

6. The Creditor Plan has been proposed in good faith and not by any means forbidden by law.

7. Each holder of a claim or interest that has not accepted the Creditor Plan will receive or retain under the Creditor Plan property of a value, as of the effective date of the Creditor Plan, that is not less than the amount that such holder would receive or retain if the debtor were liquidated under chapter 7 of the Code on such date.

8. The Creditor Plan does not discriminate unfairly and is fair and equitable with respect to each impaired class of claims or interests that did not accept the Creditor Plan.

9. All payments made or to be made by the Proponents or the Liquidating Trustee for services or for costs and expenses in, or in connection with, the Creditor Plan and incident to the case are either approved by the Court as reasonable or are subject to the approval of the Court as reasonable.

10. The identity, qualifications, and affiliations of the persons who are to be directors, officers, or voting trustees, if any, of the successor to the debtor under the Creditor Plan after confirmation of the Creditor Plan have been fully disclosed, and the appointment of such person to such offices, or their continuance therein, is equitable, and consistent with the interests of the creditors and equity security holders and with public policy. Specifically, Gary Williams, a vice president at SeaFirst, has been appointed as Liquidating Trustee and a company to be formed by Michael Speed will be appointed by the Liquidating Trustee as Operator and their appointment is equitable and consistent with the interests of creditors and equity security holders and with public policy.

11. No insiders are being employed or retained by the Liquidating Trustee. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(5)(B).

12. Confirmation of the Creditor Plan is not likely to be followed by the need for further financial reorganization of the debtor or any successor to the debtor under the Creditor Plan.

13. The Creditor Plan complies with 11 U.S.C. § 1129(a)(9) with respect to the treatment of all known priority claims under 11 U.S.C. § 507.

14. There are no governmental rate changes proposed by the Creditor Plan. Accordingly, the Creditor Plan complies with 11 U.S.C. 1129(a)(6).

15. There are no retiree benefits under 11 U.S.C. §1114 applicable. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(a)(B).

16. The principal purpose of the Creditor Plan in not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. The trust created by the Creditor Plan is a nontaxable grantor trust under subpart E of subchapter J of the Internal Revenue Code. Accordingly, the Creditor Plan complies with 11 U.S.C. § 1129(d).

17. The effect of the abandonment of the Man-Gas and DCRC stock to Clinton Manges shall be nunc pro tunc as if Manges had owned the stock continuously and the Liquidating Trustee never owned the stock pursuant to Mason v. Commissioner of Internal Revenue, 646 F.2d 1309, 1310 (9th Cir. 1980).

Modifications

18. The following modifications to the Creditor Plan are hereby made and are approved by this Court:

a. The $1.3 million Creditor Fund shall accrue interest at the same rate for SeaFirst market rate savings accounts. Interest accrued shall supplement the Creditor Fund.

b. Paragraph IV.4.7 of the Creditor Plan is hereby changed to allow for an interim

distribution of up to fifty percent rather than thirty percent.

c. Exxon shall be entitled to a Class 17 claim for any royalty it is owed.

d. The Class 3 claimants who are to receive deferred payments shall receive interest in compliance with 11 U.S.C. § 1129(a)(9)(c) at the rate of 10% per annum.

e. The basis for any security for the Class 17 and 18 claimants is Tex. Bus. & Comm. Code § 9-319.

f. The Liquidating Trustee's duties shall include filing and reporting of severance taxes on oil and gas production.

g. The third sentence in paragraph VIII.1 of the Creditor Plan and the third sentence of Article X of the disclosure statement are changed to read: "After Motion Pursuant to the Creditor Plan and a hearing, the Court may eliminate or modify the continuous drilling obligation from the Mobil Lease on grounds of 'economic waste'."

h. The Liquidating Trustee shall pay out of the Creditor Fund to the United States Trustee the appropriate sum required pursuant to 28 U.S.C. section 1930(a)(6) on the Effective Date of the Creditor Plan and provide to the United States Trustee appropriate documentation including all disbursements for the relevant periods.

i. The basis for any security for the Class 18 claimants shall include section 52.136 of the Texas Natural Resources Code in addition to any security pursuant to Tex. Bus. & Com. Code section 9-319.

j. Article IV.4.4 at page 18 of the Creditor Plan shall be changed to read as follows:

> In the event that there is a shortfall in the Production Proceeds Account to meet the above uses of funds, Seattle First National Bank ("SeaFirst") will make advances to this account to accomplish the above uses and if such advances are made, SeaFirst shall be entitled to reimbursement, plus interest, from the Production Proceeds Account for the amounts advanced.

k. The Liquidating Trustee shall have the authority to execute all Texas Railroad Commission forms, including forms P-4, as are necessary to operate the Trust Property and carry out the purposes and intent of the Creditor Plan and the Manges Debtors shall execute all necessary Texas Railroad Commission forms, including forms P-4, as may be necessary to allow the Liquidating Trustee to operate the Trust Property and carry out the purposes and intent of the Creditor Plan.

l. Any interest of any Manges Debtor in any tank batteries and gas pipeline shall be transferred to the Liquidating Trustee under the Blanket Conveyance.

m. All payments made or to be made for services or for costs and expenses in or in connection with the case or in connection with the Creditor Plan and incident to the case, by the Proponents, the Liquidating Trustee, or persons issuing securities or acquiring property under the Creditor Plan for which no administrative expense application for compensation or reimbursement is filed are hereby approved as reasonable. Any such payments for which an administrative expense application for compensation or reimbursement is filed shall be subject to court approval as reasonable.

n. Class 14 is impaired.

o. Class 15 is impaired.

p. Gary Williams, a vice president of SeaFirst, is hereby appointed as Liquidating Trustee.

q. A company to be formed by Michael Speed has been chosen as Operator by the Liquidating Trustee.

r. No insiders shall be employed by the Liquidating Trustee. In the event that the Liquidating Trustee desires to employ any insider, an application to the Court shall be made pursuant to the Motion Pursuant to the Creditor Plan procedure described in Article IV.6.1 of the Creditor Plan.

s. Articles II.14 and II.15 of the Creditor Plan are hereby amended to provide that Marynell Maloney and Vannie Cook Estate shall be eligible for Class 4 unsecured deficiency claims to the extent that their claims may be allowed and to the extent that any security for their claims is not enough to satisfy their claims.

t. All payments owed to the Manges Debtors held by any purchaser of oil or gas, including funds held in suspense by Reata and Coastal, owed on the Confirmation Date shall collectively be termed "Confirmation Date Funds". Immediately upon the signing of this order, all Manges Debtors are enjoined from drawing or otherwise using debtor in possession funds and all financial institutions holding debtor in possession funds are hereby ordered to turn over all debtor in possession funds to the Liquidating Trustee upon presentment of this order. All purchasers of oil and gas or other persons or entities owing money to any Manges Debtor, upon presentment of this order, are hereby enjoined from paying any Manges Debtor, but shall instead pay the Liquidating Trustee all sums that would otherwise be due and payable to any Manges Debtor.

u. In recognition of the undisputed fact that at least $750,000 is owed in base ad valorem tax, the total Class 9 claims shall be allowed to the extent of $750,000. This $750,000 shall be distributed to the Class 9 claimants pro rata, or as they may agree, within thirty days of the Confirmation Date or within thirty days of the Liquidating Trustee's receipt of all Reata/Coastal

Confirmation Date Funds, whichever is later. These funds received by the Class 9 claimants shall reduce their claims accordingly. The Liquidating Trustee shall place all other Confirmation Date Funds in the Production Proceeds Account.

v. The source of payment for the $750,000 shall be the Confirmation Date Funds that are SeaFirst or SFA collateral. In the event that there is not at least $750,000 in Confirmation Date Funds that are SeaFirst or SFA collateral, then SeaFirst shall pay to Class 9 whatever additional sums are necessary to make the $750,000 payment when due.

w. The remaining portion of the Class 9 claims that are ultimately found to be allowed shall bear interest at the rate of 10 percent per annum from the Effective Date until paid.

x. If the collateral that is the source of payment to the allowed Class 9 claimants is not sold within 12 months of the Confirmation Date, then installment payments out of production proceeds shall be made to the allowed Class 9 claimants. The installment payment shall be structured such that the allowed Class 9 claims are paid in full within 36 months of the Confirmation Date. These installment payments shall be made in equal installments, escalating installments, diminishing installments, or any combination of the above, with a balloon payment or payments as is reasonable in the light of the availability of production proceeds without regard to any contribution by SeaFirst. The reasonableness of

the installment payment structure shall be by agreement or determined under the Motion Pursuant to Creditor Plan procedure described in Article IV.6.1 of the Creditor Plan.

y. The following sentences are added to Article IV.4.4(ii): Property taxes for 1990 shall be paid on the Effective Date. Property taxes for 1991 shall be paid on the Effective Date or when due and payable, whichever is later.

z. Article IV.2.1 of the Creditor Plan is hereby amended to read as follows:

> IV.2.1. Execution of documents to Effectuate the Creditor Plan. Within three days of the Confirmation Date, the Manges Debtors and Helen Ruth Manges shall execute the Manges Creditor Trust Agreement and Blanket Conveyance establishing the Manges Creditor Trust and transferring all Manges Debtor Estate property to the Manges Creditor Trust, thereby creating Trust Property. Clinton Manges shall retain all property listed as exempt in his schedules filed on about March 14, 1990. There shall be no homestead claim whatsoever in favor of anyone on the Duval County Ranch or on any of the estate or Trust Property. The Manges Creditor Trust Agreement and the Blanket Conveyance shall be substantially in the form as in Appendix 1 and 2, respectively. The Manges Debtors and Helen Ruth Manges shall be under a

continuing obligation to execute, within three days of demand, all documents of any kind to assist in effectuation of the purposes and intent of the Creditor Plan. The Court may order any other person at any time to execute all documents of any kind pursuant to section 1142 to assist in effectuation of the purposes and intent of the Creditor Plan. Pursuant to this provision, by order confirming the Creditor Plan, the Court will order all signatories necessary to carry out the provisions of the Blanket Conveyance to execute the Blanket Conveyance within three days of the Confirmation Date. In the event that the Manges Debtors, Helen Ruth Manges or any other person under an obligation herein to execute documents has not executed documents by the specified deadline, then the Court appoints Colin K. Kaufman to execute documents in the stead of any of the Manges Debtors, Helen Ruth Manges, or any other necessary signatory and such signature by the above appointee shall have the same legal effect as if the Manges Debtors, Helen Ruth Manges, or any other necessary signatory had executed the documents. Further, pursuant to section 1142, the Court orders Colin K. Kaufman to execute documents pursuant to the above appointment within three days of written demand by the Proponents' or the Liquidating Trustee's attorneys. In the event of an appointee execution of a document, there shall be no recourse whatsoever against the appointee, the Court,

the Liquidating Trustee, or the Proponents, although there may be recourse against the persons for whom the signatures are being supplied. In the event of any legal or physical incapacity preventing Colin K. Kaufman from executing documents, the Court may appoint a substitute or successor appointee to execute documents pursuant to this article. The Creditor Plan also shall be as legally effective to transfer and protect title as the Blanket Conveyance and may be publicly recorded instead of the Blanket Conveyance.

aa. Article I.4.10 of the Creditor Plan is hereby amended to read as follows: I.4.10 Confirmation Date."Confirmation Date" Means the eleventh day after the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. Do not confuse the Confirmation Date with the "Effective Date" the "Consummation Date", or the "Closing Date". "Pre-Confirmation" means that period of time prior to and including the date that the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan. "Post-confirmation" means that period of time beginning after the date the Bankruptcy Court (or the District Court as the case may be) has signed the order confirming the Creditor Plan.

bb. Article I.4.19 of the Creditor Plan is hereby amended to read as follows: I.4.19 Effective Date. "Effective Date" means the ninetieth day

after the Confirmation Date. If the Effective Date falls on a Saturday, Sunday or legal holiday under the Federal Rules of Civil Procedure, then the Effective Date shall be the next weekday that is not a legal holiday.

cc. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

dd. Notwithstanding any provision to the contrary, and except as herein provided, all Creditor Fund distributions shall be made within 36 months of the Effective Date (the "Distribution Deadline"). In the event that the Distribution Deadline arrives and all Creditor Fund collection and Eligibility matters are not completed, the Liquidating Trustee shall make Creditor Fund distributions to eligible allowed claimants on the Distribution Deadline and withhold only so much of the Creditor Fund as may be reasonably necessary to cover remaining Creditor Fund Collections and Eligibility Matters.

ee. Notwithstanding any provision to the contrary, the Liquidating Trustee may at any time file a Motion Pursuant to Creditor Plan to allow Class 16 and Class 2 claims prior to the claims objection and subordination bar dates.

ff. Upon the signing of the order confirming the Creditor Plan, the January 16, 1991 foreclosure on the Duval County Ranch is hereby rescinded

and made void ab initio and all liens in existence immediately prior to the foreclosure, including the Proponent's liens, are reinstated in the order of priority that existed immediately prior to the foreclosure. The Blanket Conveyance shall include a provision whereby the Manges Debtors convey the Duval County Ranch to the Liquidating Trustee. The Duval County Ranch shall be Trust Property, and the Liquidating Trustee shall treat the Duval County Ranch and its income as Trust Property under the Creditor Plan. Accordingly, the Liquidating Trustee shall sell the Duval County Ranch pursuant to the Creditor Plan and a lien shall attach on sale proceeds in favor of those creditors, including the Proponents, with liens against the Duval County Ranch immediately prior to the foreclosure. The effect of this provision shall be to make moot any adversary proceedings, appeals, or other actions or proceedings concerning the lifting of the stay on actions against the Duval County Ranch, the foreclosure on the Duval County Ranch, and the eviction from the Duval County Ranch. In the event that the confirmation of the Creditor Plan is overturned on appeal, denied upon reconsideration, revoked, or otherwise found invalid, then the foreclosure and eviction are reinstated in full and fee title to and the right to possession, dominion, and control of the Duval County Ranch automatically shall revest in Seattle First National Bank without the necessity for any action whatsoever by the Court or the Manges Debtors.

gg. The last unnumbered paragraph of Article IV. 2.2 is hereby amended to read: Failure

to cooperate fully shall be punishable by any available remedy and specifically by contempt of court; and all reasonable costs and reasonable attorney fees incurred in connection with any such motion for contempt may be assessed against the disobedient party in the court's discretion. The Liquidating Trustee shall be entitled to a writ of execution, writ of assistance, writ of ejection, forcible detainer, or forcible entry and detainer, upon application to the clerk.

hh. The Liquidating Trustee shall provide to the IRS any necessary information returns and shall provide such information to the Manges Debtors as may be reasonably necessary to enable the Manges Debtors to file income tax returns.

ii. Article IV. 6.c. and IV. 6.d. are hereby modified to read as follows:

c. To invest and reinvest the Trust Property in any demand deposits.

d. To enter into any transaction with respect to the Trust Property despite the fact that another party to any such transaction may be the Proponents.

jj. This liquidating trust shall terminate 36 months from the Effective Date unless the Liquidating Trustee, in his sole discretion, determines that an extension is necessary to complete unfinished duties.

kk. Production Proceeds income shall be distributed annually to SeaFirst except to the extent reasonably necessary to meet Creditor Plan obligations.

ll. In the event that all allowed claims are paid in full, any remaining Trust Property or Creditor Fund money shall revert to the Manges Debtors pro rata.

mm. Notwithstanding any provision that may appear to the contrary, the conveyance of bankruptcy estate property by the Manges Debtors to the Liquidating Trustee pursuant to the Creditor Plan and Blanket Conveyance shall be subject to liens and encumbrances. The Liquidating Trustee shall then sell the Trust Property free and clear of liens with such liens of allowed secured creditors attaching to the sales proceeds or net sales proceeds as provided in the Creditor Plan.

19. The modifications in paragraph 18 supersede all modifications that appeared in the Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof signed by the Court on March 11, 1991.

The Creditor plan filed by Seattle-First National Bank and SeaFirst America Corporation on January 29, 1991, a copy of which is attached hereto, is confirmed as modified herein.

Signed and ordered entered this date: June 7, 1991

BY THE COURT

/s/ Richard S. Schmidt
RICHARD S. SCHMIDT
UNITED STATES BANKRUPTCY
JUDGE

IN THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

IN RE	§	
	§	
DUVAL COUNTY	§	
RANCH COMPANY	§	
	§	NO. 89-01286-C-11
DEBTOR	§	

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	§	
MAN-GAS	§	
TRANSMISSION	§	
COMPANY	§	NO. 89-01532-C-11
DEBTOR	§	

CLINTON MANGES,	§	
	§	NO. 89-01531-C-11
DEBTOR	§	
	§	

ORAL RULING ON CONFIRMATION OF
FIRST AMENDED ORIGINAL CREDITORS' PLAN
OF REORGANIZATION OF
SEATTLE FIRST NATIONAL BANK
AND SEAFIRST AMERICA CORPORATION

On May 29, 1991, at approximately 4:20 pm., the Honorable Richard S. Schmidt, United States Bankruptcy Judge, issued the following oral ruling on confirmation of First Amended Original Creditors Plan of Reorganization of Seattle First National Bank, which has been transcribed by the plan proponents from the Court's official tape:

EXHIBIT B

THE COURT:

Allright. Presumably, this is all who were interested, or are interested enough to get on the phone call or knew how to get on the phone call. So, I have, I have been working with this case since 1989 when it was filed in October, on October 2nd of 1989, the beginning of the case. We have, this is the second time we've come up on confirmation. We've had hearings on, on this confirmation on the May 1st, 13th, and the 20th and then again this morning arguing on, on confirmation of this particular matter. The case is nearing the two year mark, although I guess its about a year and a half old. The standard for under Timbers, as I understand it, is one business cycle for the normal time for reorganization. The, we have not, we, we went beyond the debtors' exclusivity period obviously without a reorganization. We had a debtors plan that was, that was filed in June of 1990, I think certainly well within the standards for, for the amount of time involved in, in handling a case of this size and this complexity. Although that issue could be tempered by the fact that the deadline, this, this matter has really been worked out on a couple of occasions prior outside the bankruptcy in basically what were workouts, so that in essence, they came to the bankruptcy court after having failed to perform under plans that were done outside of bankruptcy pursuant to agreed orders in another court. Confirmation was denied on the debtors plan on December 5, 1991 [sic.]. The creditors plan was filed before that on 11/30/91. There has been a motion to relief, for relief, that's been passed along throughout this case. I, I, I hesitate to make statements like this, but it seems to me that basically the only reason to me that the stay hasn't lifted to date is the fact that the creditor hasn't pressed it. The creditor has chose instead to push forward

on the confirmation of the plan. That the, the, in terms of what I understand the standards are in the Fifth Circuit, for sure, and perhaps from the Supreme Court, that this case is well outside the, the limits of, of what, of providing adequate protection by virtue of, of adequate protection in failing to lift the stay. However, that issue is not before me today but I think it plays in my decision of what to do because I think that my decision is not a question of, is this the best possible plan that we can confirm, which you never do that, you only, the court is required to look at, is the plan confirmable. In this particular case, I think it makes it even more concerning because it seems to me that the plan isn't confirmable, then the stay is going to have to lift and, and we either go away, this case goes away by loss of all of its assets, and, the creditors get nothing, those, at least those that don't have some sort of security. It's not really a good case to convert to chapter 7, on, to be perfectly honest because I'm not so certain why a trustee should be thrust in between these two semi-warring parties. The, the suggestion was made just like a West Texas battle over what people were grabbing onto either side. I, I don't really think that. I don't believe that the two parties here have got a hold of each other until death, I, I think that the, both sides, I think that Mr. Manges has ahold of his property and his, and his assets that he wants to hold on until, until, with, with all due voracity and I think that the bank wants to get paid. But I, I don't think, I have not sensed that kind of war. This has been a hotly fought battle, but there has been accommodation, I, I have found by both sides in this particular case, and, this has not been a Rambo operation. At least it didn't seem that way to me, of course I wasn't at the depositions. But, but in terms of the way both parties have, have, have responded in court, both sides have responded exemplary in court throughout, throughout

this battle. And it's remarkable how well Mr. Manges has been able to come forward with high quality legal talents even in this, this particular hearing in which they were required to get up to date on, on some very complicated issues and present in a very credible fashion the defense that they did, in this, in this hearing. And, of course on the other side, the bank, I understand their firm went through some reorganization in their bankruptcy section at the same time this was going on, so they were having to deal with complicated legal issues and did a very credible job on their side. And, I, I say that not because I, I'm trying to strike points with the lawyers but only because I, they don't get, they don't get that kind of, they probably didn't get mentioned enough. But there has been no one who has laid back in this case. The lawyers have worked hard, the parties have worked hard, and for various reasons I am going to confirm this plan, then I'll take the mystery out of my ruling. But its, its not an easy thing to do, because it affects people and it affects lots of different rights. But to me in the context of all of the alternatives that, that this is the best, this is, I think, the most fair and equitable treatment of the creditors, and qualifies under the code for confirmation. I'm going to go over, I'm going to do this in an abbreviated fashion so we don't sit here all day. I'm going to, I have reviewed the findings of fact that, that have been filed by the bank but I am going to first make the following comments, which are part of my findings of fact and conclusions of law and then adopt the findings of fact and conclusions of law that the, that the bank has submitted. But with these additions, first of all, and I'm going to deal with them in subject matters.

As to the issue concerning the tax, tax consequences of confirmation. A great deal of issue was made over the, over the grantor trust provision, section 336, whether it

applies, etc. There are no cases or, or regulations on 336 and it's my opinion after reviewing the law and the argument that we've had that grantor trusts are viable entities after the tax reform act, that, that this particular plan does provide a grantor trust, for a grantor trust, which would pass tax consequences on to the grantor and not to the trust. That the operation by the, by the trustee of the oil and gas fields as contemplated in the, in the trust, will, is reasonable and necessary, especially in consideration of the peculiar aspects of operation of oil and gas in that the, in that the res itself can be lost if its (sic) not used, in both from a, from a geological standpoint, and also from a lease obligation standpoint so that it is necessary, and in fact prudent and necessary, for those operations to continue and that should not effect the tax consequences of the grantor trust. That particular limit of operation of those fields. Furthermore, it seems to me, that the rescission contemplated, that the rescission contemplated by the, the confirmation of this plan can be effectuated. That the, that in some respects it is a legal fiction that has created the rescission, but the rescission will provide for rescinding the operation of the foreclosure will be provide for putting the estate back into possession of the property and immediately transferring it to the trust and that the existence of the lease, will not be sufficient to, to, to outweigh, to cause it to be taxed any, any differently, and that the, the lease treatment can be squared away a number of ways but by re-leasing the property or, or by simply even making it subject to it but either way its de minimis and will not affect the tax consequences of the, in the operation of this. Furthermore, the, the trust as set up will not be treated as a corporation, but while it certainly could be in the future treated as a corporation, the bank runs its own risk in doing so, since it presumably could, could be held liable for the taxes if in fact the trustee

begins to operate outside the, the parameters set up and provided for in the tax code as well as in the trust agreement and so they do so at their own peril. But, as contemplated the, the trust will not be treated as a corporation, but will be treated as a grantor trust.

As respect to Mrs. Manges. The testimony was uncontroverted that she had notice of this particular, of this particular plan confirmation, that she, she chose not to participate in it, that she was not served, however, with any, any, was not specifically served with any of the, confirmation documents. However the, all of the property that is subject to the confirmation and subject to operation under the, under the provisions of the, of the plan is property of the estate since it is, community property or property under the separate administration control of Mr. Manges or his separate property. So therefore all of the property is properly the subject of this, of this court, and property within the jurisdiction of the court and all of the obligations sought to be enforced are in rem obligations, not the personal obligations of Mrs. Manges. The bank has also sought to, gratuitously I guess, say that they wouldn't require her to, to sign any of the documents. I guess if they want to eliminate that appeal, that appeal position, they can do that if they want to, but it seems to me that there is ample authority for, for requiring her to effectuate the sale of the documents since these are all property of the estate and in rem obligations that we're talking about especially in consideration of the fact that she had notice of the bankruptcy for sure and had actual notice of this confirmation going on over the last month.

The issue of appeal. The appeal before the Fifth Circuit on the on the foreclosure as I understand it has not been stayed. This court does have the authority to go

forward with confirmation regardless to what that does to that appeal. Perhaps if it, if this were a debtors plan and it was overturning the appeal or, or there might be some concern. But in fact the effect of this plan is to in fact, in fact overturn the foreclosure as though it never happened, which is what the debtors are seeking on appeal anyway. So that it seems to me that, that I have the authority to go forward despite the appeal in the Fifth Circuit.

The homestead issue. After reviewing the record, I believe that I am bound by the previous findings of the previous courts on at least two occasions that the property is not the homestead of the debtor so that is not an issue since it is, has been decided by a previous court specifically.

Consolidation. There was testimony concerning, by the officers and director, the test for consolidation is different from, in the context of confirmation of a plan, than, than it was earlier in the case where the effect would be significantly different. Here, in the the, the test should be construed in accordance with the case law the, and I agree with the case out in the Western District of Texas, whose name escapes me at the present time I don't know whether its Ayers or Clark, probably one of those two, the prolific writers of the Western District. The, but the testimony in this case does seem to meet all of the tests set out in that case and furthermore in context of the, in the context of the benefit to all of the creditors, it seems to me that there is little impact other than, in the context of this case, it gives the debtors, the creditors a, at least a good prospect of some recovery which, there standing alone, none of these cases, it doesn't seem to me might be worked out with the exception of perhaps the Man-Gas case itself. But, but here it seems to me the, the, the plan

pays far more than, than, chapter 7 would provide for even those creditors. So that, in the context of this, this plan, it seems to me that consolidation is appropriate. The only negative, possible negative, impact of consolidation is the potential impact that the debtor might have, have on the debtor, in elimination of his opportunity to effectuate a, an election to convert the S corporation to a, whatever, C corporation or whatever its called. The effects of that can be minimized by the fact that I'm not signing the order until Friday so that at least a couple of days for him, if he wants to, to make the election prior to confirmation he can do that. I'm not saying that, that the consolidation mandates that he can no longer make that election, but he certainly can make it within the next two days if he wants to.

The amendments. The amendments are set out in detail in the findings of fact and conclusions of law, well pardon me, in the order, the proposed order of confirmation that everyone has received a copy of. Most of those are very technical in nature and don't really effect anything other than, other than things such as shortening of the, the restrictions on the trustee, pointing out exactly who the trustee was going to be, pointing out exactly who would be the operator, things of that sort, and are not material. The, none of them are material to anyone voting in favor of the plan and, nor, nor does it, do I believe that, that the amendments are detrimental. It seems to me that the only one that, that we would need to be concerned about, in, in terms of materiality would be the, the amendment which provided for the, the revocation of the, of the, or the rescinding of the foreclosure. Those parties who that might materially affect, seems to me, are the state land office who is here and voting for the plan and certainly understands the effect of that and has no

objection to it and the IRS, who is here, understands the plan, and has not expressed any objection to it. So whatever negative tax consequences of that foreclosure would be done away with by virtue of the confirmation of this plan, it makes sense for the IRS not to object since they are going to get the bird in the hand of the $750,000 claim when this plan is confirmed, whereas if it's not confirmed, they, they may never get that, they may never get anything out of the foreclosure either since the property has, may not be any equity in it. So I think the IRS has made an informed decision not to object to this plan. Whether they had sent Mr. Ludka here, even though he is not from the department of justice or the IRS or whether they made it up at a higher level, I don't know. But I think its the right decision that they made and I think that they made that decision and they have certainly been here. Furthermore, all of the people have had this amendment since the first of May, the hearing has continued over a period of a month so that any, any lack of notice that anyone has had seems to me has been cured by the fact that I have stretched this hearing out in order to give everyone a time to respond if they so chose and it seems to me if they didn't respond that's their problem.

So with those specific findings, I'm not going to read into the record these findings, although I have gone over them in detail. I would now adopt, in addition to these specific comments I've made, I'm now going to adopt the thirty-two pages of findings of fact and conclusion of law by the, provided by the, by the bank. I have not reviewed in detail, other than the modifications, the order confirming the plan and am not prepared to say that this is exactly the order that I'm going to sign confirming the plan, so I will review that over the next couple of days and prepare the order, which I will sign some time on Friday.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7328

IN THE MATTER OF:
CLINTON MANGES,

Debtor.

CLINTON MANGES, DUVAL COUNTY RANCH C
AND MAN-GAS TRANSMISSION,
Appellants-Cross Appellees,

versus

SEATTLE-FIRST NATIONAL BANK and
SEAFIRST AMERICAN CORPORATION,
Appellees-Cross Appellants.

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IN THE MATTER OF: DUVAL COUNTY RANCH C,
Debtor.

CLINTON MANGES, DUVAL COUNTY RANCH C
and MAN-GAS TRANSMISSION,
Appellants-Cross Appellees,

versus

SEATTLE-FIRST NATIONAL BANK and
SEAFIRST AMERICAN CORPORATION,
Appellees-Cross Appellants.

****

IN THE MATTER OF: MAN-GAS TRANSMISSION,
Debtor.

CLINTON MANGES, DUVAL COUNTY RANCH C
and MAN-GAS TRANSMISSION,
Appellants-Cross Appellees,

versus

SEATTLE-FIRST NATIONAL BANK and
SEAFIRST AMERICAN CORPORATION,
Appellees-Cross Appellants.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION(S) FOR REHEARING

(September 27, 1994)

Before KING and SMITH, Circuit Judges and KENT*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed the above case is denied. The mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

*District Judge of the Southern District of Texas, sitting by designation.

REHG-2
Rev. 7/1/94

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Respectfully submitted,

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